

SUPPLEMENTAL DRAFT  
ENVIRONMENTAL IMPACT STATEMENT

PROPOSED RESIDENCE INN



THARALDSON DEVELOPMENT COMPANY



APPLICANT

Project Location:  
124-128R Washington Avenue Extension  
Albany, New York

Lead Agency: **Common Council of the City of Albany**

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DECISION & ORDER  
INDEX NO. 1783-06  
RJI NO.: 01-06-085081  
SAVE THE PINE BUSH INC., ET AL.

V

THE COMMON COUNCIL OF THE CITY OF ALBANY AND THARALDSON  
DEVELOPMENT CO.

APPENDIX SDII  
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IMPACT STATEMENT AND MANAGEMENT PLAN, DATED APRIL 2002

APPENDIX SDIII  
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PLANT SPECIES  
DATED: JULY 23, 2007  
BY DR. RICHARD P. FUTYMA, PhD  
THE LA GROUP

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ENDANGERED, THREATENED AND SPECIAL CONCERN  
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DATED: AUGUST, 2007  
BY MICHAEL P. BONTJE, PRESIDENT  
B. LAING ASSOCIATES, INC.

APPENDIX SDV  
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STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION DATED  
OCTOBER 20, 2006

APPENDIX SDVI  
LETTER REPORT BY DR. RICHARD P. FUTYMA, PhD  
THE LA GROUP DATED JUNE 9, 2006

## I. EXECUTIVE SUMMARY

### Introduction

This SDEIS is prepared to address, among other things, the issue identified in the Decision & Order (the "Decision") in the case of Save the Pine Bush Inc., et al. v The Common Council of the City of Albany and Tharaldson Development Co. (see Appendix SDI) concerning 'rare' plant and animal species known to be present in the Albany Pine Bush.

On February 7, 2007, the Hon. Thomas J. McNamara issued the Decision which found that the City of Albany Common Council took a hard look at the potential environmental impacts of this Project on the Pine Bush Preserve and the Karner Blue butterfly subpopulation located south of the Site. Specifically, the Decision determined:

- "The Common Council took the requisite hard look at the taking issue" concerning the Karner Blue Butterfly.
- The Common Council took a hard look at the potential impacts at the issue of the proximity of the Site to an occupied Karner Blue butterfly site "and [the Common Council] provided a reasoned elaboration".

The Decision also dismissed the claims finding that:

- The Common Council took a hard look at the alleged relationship of a SPDES Permit issued by NYSDEC to the property.
- The review by the Common Council of prior clearing of the Site "satisfied the obligations imposed on the lead agency [the Common Council] by SEQRA".
- "Restoration" of the Site was properly analyzed by the Common Council.
- "[T]he alternatives were adequately addressed" by the Common Council.
- Claims concerning the landfill were "moot", based on "fear and speculation" and, in any event, any discussion of a landfill expansion should be made in context of such an expansion. "That process would afford petitioners the opportunity to challenge any threat such action might pose to the creation of a viable preserve."

However, the Decision determined the following was not adequately addressed as part of the earlier SEQRA review in the environmental impact statements:

Missing from the Futyma reports are any discussion of animals, other than butterflies, which may be present on the site. And, though considerable attention was given to the impact the project may have on the off-site Karner blue butterfly population, and to a lesser extent the Frosted Elfin butterfly, there is no evaluation, despite the contrary statement in the FEIS, of the impact the project may have on any of the 'rare' plant and animal species known to be present in the Albany Pine Bush particularly those specifically identified by NYSDEC and the APBPC. Consequently, with respect to this issue the environmental impact statements are deficient.

As a result, the "determination of the City of Albany Common Council "pursuant to SEQRA [was] vacated, the ordinance rezoning the site [was] annulled and the matter [was] remitted to the Common Council."

In order to proceed further with consideration of the Project consistent with SEQRA and the Decision, this SDEIS has been prepared to address the issue identified in the Decision.

A. Brief Description of Action

Tharaldson Development Company ("Applicant") has filed an application for rezoning property located at Nos. 124 – 128R Washington Avenue, a ±3.6 acre project site ("Project Site" or "Site"), from R-1B (Single-Family Medium-Density Residential District) to C-2 (Highway Commercial). Tharaldson Property Management, Inc. is the largest independent hotel property management company in the United States, and operates, under contract, 355 hotels in 36 states. This project involves the construction of a ±124-unit/room Residence Inn (the "Project") including site improvements on the Project Site and traffic improvements in the vicinity of the Project Site. The Project also requires an area variance by the Albany Board of Zoning Appeals regarding construction of a fence along the southern and eastern property boundaries. A minor site plan modification to the previously approved Site Plan will be required from the City of Albany Planning Board.

B.            History of Actions Involving the Proposed Project

On September 10, 2003, Tharaldson Development Co. filed an Application and SEQRA Full Environmental Assessment Form for a zoning change. Based upon review of the Applicant's submitted Full Environmental Assessment Form and all other application materials that were prepared for this Project, and oral and written comments received, on February 19, 2004, the City of Albany Common Council, acting as Lead Agency, adopted a SEQRA resolution with findings that the Project may have significant adverse impact on the environment and issued a positive declaration of environmental significance for the Project.

Thereafter, the Common Council engaged in a public scoping session during 2004. A Draft Scope was adopted, and a public hearing was conducted on August 26, 2004.

The Final Scope for the Project was thereafter adopted on September 20, 2004. The Draft Environmental Impact Statement ("DEIS") was prepared, received, reviewed and accepted by the Common Council as being consistent in form and content to the Final Scope.

Regarding "rare" species, and species of special concern, the DEIS contains comprehensive analysis of, among other things, the Pine Bush Commission's 1996 Implementation Guidelines and 2002 Management Plan. The DEIS included a color copy of the Commission's 2002 "Vision" plan for the Pine Bush Preserve. Neither of these management plans: a) proposes preservation or protection of the Site for any rare, endangered, threatened, or special concern species or its conservation for any type of species; b) indicates that the Site possesses "significant environmental resources" or that development of the Site would impact any threatened, endangered, rare or species of special concern. Both the 1996 Implementation Guidelines and 2002 Management Plan were cited extensively in the DEIS.

The 2002 Management Plan also contains an evaluation of "rare" species and location maps (Map 16 entitled "Significant Cultural and Environmental Resources" and Map 17 entitled "2002 Protection Priorities/Preserve Vision") confirming the management goals for such "rare" species do not include preservation or restoration of the site, and therefore, will not be impacted by development of the Project.

The DEIS also cited a May 2000 report from Dr. Richard Futyma in connection with another project on the site in which Dr. Futyma noted:

I did not find any plant species that are listed by either the Federal or New York State Government as rare, threatened or endangered, **nor did I observe any habitats that are known to be of importance to any**

**rare, threatened or endangered animal species.**  
DEIS p. 33 (Emphasis added)

The DEIS concludes:

Based on the Implementation Guidelines, 2002  
Management Plan and [Dr. Futyma] Site visit:

- a. The Site has not been targeted for acquisition for incorporation into the Albany Pine Bush Preserve;...
  
- c. **The Site does not contain any significant ecological areas;**... (Emphasis added)

It was documented in the earlier SEQRA review that 2.3 +/- acres (comprised of several parcels) of the 3.60 acre Site was previously cleared and consists of gravel. Of the remaining 1.3 +/- acres, 0.25 will be available for preservation along the southwest corner of the property and managed by either NYSDEC or the Commission as part of the "corridor area". The relatively small Site is situated in a highly commercial corridor on Washington Avenue Extension a major east west travel corridor. Consequently, based on such location and lack of any significant ecological resources, the Site is not identified for any conservation or preservation purposes for any endangered, threatened or rare species or species of special concern.

A public hearing was conducted on April 18, 2005. The public comment period was closed on May 19, 2005.

A Final Environmental Impact Statement ("FEIS") was prepared, submitted and reviewed by the Land Use, Planning and Zoning Committee of the Common Council. On November 21, 2005, the Common Council adopted a resolution which determined that the FEIS was complete and adequately addressed the substantive comments received concerning the DEIS.

On December 19, 2005, the Common Council adopted a Findings Statement, pursuant to the SEQRA, completing the over two-year environmental review of the Project. Thereafter, the Common Council by a vote of 10-3 rezoned the Site from R-1B (Single Family Medium Density) to C-2 (Highway Commercial).

On August 23, 2006, the City of Albany Board of Zoning Appeals, an involved agency during the SEQRA process, adopted a SEQRA Findings Statement and approved an area variance for the Project, authorizing the height of the building.

On September 21, 2006, the City of Albany Planning Board, an involved agency during the SEQRA process, adopted a SEQRA Findings Statement and approved the Site Plan for the Project.

On February 7, 2007 the Decision vacated the Lead Agency SEQRA Findings Statement, annulled the ordinance rezoning the Site and remitted the matter to the Common Council.

C. Summary of Items to be Addressed

This SDEIS addresses the issue identified in the Decision & Order in the case of Save the Pine Bush Inc., et al. v The Common Council of the City of Albany and Tharaldson Development Co. (see Appendix SDI) The Decision states:

Missing from the Futyma reports are any discussion of animals, other than butterflies, which may be present on the site. And, though considerable attention was given to the impact the project may have on the off-site Karner blue butterfly population, and to a lesser extent the Frosted Elfin butterfly, there is no evaluation, despite the contrary statement in the FEIS, of the impact the project may have on any of the 'rare' plant and animal species known to be present in the Albany Pine Bush particularly those specifically identified by NYSDEC and the APBPC. Consequently, with respect to this issue the environmental impact statements are deficient.

Upon examination of the extensive record conducted during the earlier SEQRA process, it indicates that the only references to "rare" plant and animal species "specifically identified" by NYSDEC and the APBPC, "other than butterflies", known to be present in the Albany Pine Bush include the following species: Hognosed Snake (special concern), Worm Snake (special concern), Eastern Spadefoot Toad (special concern) and Adder's Mouth Orchid (endangered). As indicated in the Decision, the court confirmed that the analysis concerning butterflies, the Karner Blue Butterfly and Frosted Elfin, met the "hard look" test required by SEQRA. Therefore, as noted by the Decision, this SDEIS identifies the specific species raised by NYSDEC and the APBPC and provides a thorough evaluation of such species.

However, rather than limiting the evaluation to the "specific species" noted by the NYSDEC and APBPC, in order to ensure a full and complete evaluation of all "rare" species and species of special concern known to be present in the Albany Pine Bush, the Applicant caused its expert consultants to examine all 19 rare plant and animal species and species of



special concern to be evaluated as derived from the APBPC's 2002 Management Plan.

In addition, an inquiry was also directed to the New York State Department of Environmental Conservation, Division of Fish, Wildlife & Marine Resources, New York Natural Heritage Program. A response was sent on July 9, 2007. This letter contained information listing the NYS legal status of species which may be located in the vicinity of the subject parcel. This list identified one Endangered animal species, one Threatened animal species, one animal species of Special Concern and one Rare plant species potentially in the vicinity of the project, some having been reported on sites distant from the site. The letter also provided information on four NYS Unlisted species. This letter or list is not reproduced in this document based upon the following warning contained in the letter:

"The information contained in this report is considered sensitive and should not be released to the public without permission from the New York Natural Heritage Program." (Emphasis in the original)

This letter was shared with Dr. Richard Futyma and B. Laing Associates, experts whose most recent reports are included in Appendices SDIII and SDIV, and their opinion regarding the absence of any threatened species, endangered species, species of special concern and rare species included those species identified in the letter from NHP.

This SDEIS incorporates by reference the DEIS and FEIS for the original environmental review and supplements the information as appropriate.

D. Conclusion

Consistent with the Decision, this SDEIS analyzes every identified endangered, threatened, rare and species of special concern and concludes that none of such species known to be present in the Albany Pine Bush exist on the Project Site and the development of the Project will have no significant adverse environmental impact on such species which may be in the vicinity of the Site.

E.    Listing of Involved and Interested Agencies:

Involved Agencies:

- City of Albany Common Council – Zone Change
- City of Albany Board of Zoning Appeals – Variance
- City of Albany Planning Board – Site Plan modification

Interested Agencies:

- Albany County Planning Board
- New York State Department of Environmental Conservation
- Albany Pine Bush Preserve Commission
- United States Fish and Wildlife Service

## II.    PLANTS AND ANIMAL SPECIES EVALUATED

### A. INTRODUCTION

This Supplemental Draft Environmental Statement (SDEIS) has been prepared for the City of Albany Common Council, the lead agency, in compliance with Article 8 of the Environmental Conservation Law (ECL), also known as the New York State Environmental Review Act (SEQRA), and implementing regulations (6 NYCRR Part 617). The Applicant is seeking approval to construct and operate a ±124-unit/room 3 – story Residence Inn on the ±3.60 site located along Washington Avenue Extension in the City of Albany. This SDEIS addresses the issue raised in the Decision & Order in the case of Save the Pine Bush Inc., et al. v The Common Council of the City of Albany and Tharaldson Development Co. (see Appendix SDI) (the “Decision”).

#### 1.    Existing Information in the Record

The prior SEQRA review contained the results of the ecological assessments of Dr. Richard Futyma, PhD of the Site and potential Project related impacts including, but not limited to, May 2000 reports and 2004 and 2005 reports, which confirmed that there were no “rare”, threatened, endangered or special concern plant and animal species located on the Site. Dr. Futyma’s May 2000 report states that:

I did not find any plant species that are listed by either the Federal or New York State Government as rare, threatened or endangered, nor did I observe any habitats that are known to be of particular importance to any rare, threatened or endangered animal species.  
(Emphasis added)

See, Draft Environmental Impact Statement, p. 33.

In the FEIS, Dr. Futyma expanded and supplemented this prior report by confirming that “None of the plants or animals that I identified on the project site are listed by New York State or the Federal government as rare, threatened or endangered species.” See, Appendix D to the FEIS.

Therefore, Dr. Futyma’s reports concluded that there were no “rare” plant and animal species located on the Site.

The DEIS and FEIS also analyzed the 1996 Implementation Guidelines, and 2002 Management Plan. These management plans identify preservation goals for “rare” species. Neither of these management plans for the Albany Pine Bush Preserve identifies the Site for protection for any “rare” species, or that it

possesses any significant ecological resources or is necessary for inclusion in the Pine Bush Preserve.

The Site was not included in the APBPC's "Vision" plans for management and/or protection under either the 1996 Implementation Guidelines or 2002 Management Plan for the Pine Bush Preserve. The "Vision" plan from the 2002 Management Plan was included in the DEIS at page 29.

Regarding "rare" species, Page 46 of the 1996 Implementation Guidelines notes:

To minimize any adverse impacts on the Karner Blue butterfly and other species incapable of escaping fire (i.e. the eastern spadefoot toad, hog-nosed snake, inland barrens buck moth egg masses) areas supporting these species will initially be managed so that a remnant population survives that can then re-colonize the treated area. For example, this can be done by burning only a portion of the area that supports the Karner Blue so that suitable habitat and survivors remain. Managing only a portion of the area at any one time will allow us to monitor the species response to treatment and provide valuable information for making even more effective management decisions in the future.

The Site was not identified for such management purposes.

At Page 34 in Appendix 2 of the 1996 Implementation Guidelines, it is noted that: A survey of plant and wildlife has already been conducted and is documented in the Inventory of Rare Plants, Animals, and Ecological Communities of the Albany Pine Bush Preserve (NYNHP, 1991). Consistent with this determination, Map 6 of the 1996 Implementation Guidelines entitled "Areas Containing Additional Known Significant Environmental Resources" does not depict the Site providing any "environmental resource."

Similarly, the 2002 Management Plan indicates that ecological communities in the Pine Bush have been mapped by different sources. Table 1 lists the ecological communities in the Albany Pine Bush Preserve by the New York Natural Heritage Program classification. The location and extent of these communities are located in Figure 5.

Figure 5 does not depict the Site providing any "ecological resource."

The 2002 Management Plan contains an evaluation of the "Rare, Declining and Vulnerable Species within Ecological Communities of the Albany Pine Bush". See Appendix SDII. One of the "Goals" in the 2002 Management Plan is to "Protect and Manage Significant Cultural and Environmental Resources" including protecting and managing "wetlands, streams and ravines that provide habitat for rare locally important species and maintain the hydrologic processes of pine barrens vernal ponds." 2002 Management Plan, p. 25. There are no such wetlands, streams or ravines on or in the vicinity of the Site.

Regarding "Other Rare, Declining and Vulnerable Species", the 2002 Management Plan states that other than the Karner Blue butterfly, "there are several rare declining and vulnerable species found within the pitch pine-scrub oak and other natural communities that exist within the Preserve. Restoration and management of these communities (particularly some of the wetland areas) with the techniques previously described will generally benefit the rare, declining or otherwise vulnerable invertebrate species that reside there. Periodic assessments, including viability analysis, are recommended. Such work should be linked to the management unit planning efforts described above." 2002 Management Plan at p. 45.

The Site was not identified for restoration and management or for any management unit planning efforts.

In conclusion, the 2002 Management Plan states that the ecological benefits of the proposed action include: "the protection, maintenance and restoration of unique pine barrens communities and rare, declining and vulnerable species (including the Karner blue butterfly) and their habitats... **Protection of the identified areas** also serves to protect and maintain forests, wetlands and important water resources [which] is important to the maintenance of good water quality, hydrological processes and viable amphibian species. Reducing invasive species will increase long term viability and "in addition, other rare, declining and vulnerable species that use pitch pine-scrub oak barrens and high quality wetlands for habitat will benefit. (Emphasis added) Page 88 -90 of the 2002 Management Plan.

Based on the 1996 Implementation Guidelines and 2002 Management Plan, the Site is not identified for any protection status and the development of the site is therefore not expected to result in a potential significant adverse environmental impact on rare plant and animal species in the Albany Pine Bush.

## 2. Supplemental Information

The 1996 Implementation Guidelines and 2002 Management Plan, however, do not provide a specific analysis of the Site and its natural features. This SDEIS expands on this prior information and specifically addresses the issue raised in the Decision (see Appendix SDI) relating to potential impacts of the Project on 'rare' plant and animal species known to be present in the Albany Pine Bush.

A. Dr. Futyma reevaluated each of the plant species on the Site and confirmed there are no endangered, threatened or rare plant species on the Site, including the Adder's Mouth Orchid, Schweinitz flatsedge or *Scleria Triglomerata* and there will be no significant adverse environmental impacts on any such species which may be in the vicinity of the Site as a result of the Project. Appendix SDIII. These results are discussed below.

B. B. Laing Associates performed an evaluation of invertebrates, reptiles, amphibians and avian species on and in the vicinity of the Site and confirmed there are no endangered, threatened, rare or special concern invertebrates, reptiles, amphibians and avian species on the Site and there will be no potential significant adverse environmental impacts on any such species which may be in the vicinity of the Site as a result of the Project. Appendix SDIV. These results are discussed below.

**B. LISTING OF SPECIES FROM 2002 ALBANY PINE BUSH MANAGEMENT PLAN**

'Rare' plant and animal species known to be present in the Albany Pine Bush, but not necessarily on or even in the vicinity of the Site, are listed in the current Management Plan. Other than butterflies, NYSDEC specifically identified three "rare" species or species of special concern during the earlier SEQRA process. The APBPC noted the Pine Bush Preserve is "home to 19 rare plant and animal species", including the Adder's Mouth Orchid. Table 4 in Albany Pine Bush Commission Final Environmental Impact Statement and Management Plan, dated April 2002 (see Appendix SDII) is a list entitled "Rare, Declining and Vulnerable Species within Ecological Communities of the Albany Pine Bush".

To ensure a complete evaluation of all "rare", threatened and endangered species and species of special concern in the Albany Pine Bush, including, but not limited to, those species specifically identified by NYSDEC and the APBPC, consistent with the Decision, the Applicant utilized and evaluated all the plant and animal species listed as endangered, threatened, rare or of special concern on various NYS maintained lists in Table 4 in the 2002 Management Plan. These are the following:

Invertebrates

Mottled Duskywing Skipper	Special Concern
Henry's Elfin	Special Concern
Frosted Elfin	Threatened
Karner Blue Butterfly	Endangered

Plants

Yellow Giant-Hyssop	Threatened
Side-Oats Grama	Endangered
Schweinitz's Flatsedge	Rare
Bayard's Malaxis	Endangered
Virginia False Gromwell	Endangered
Slender Marsh Bluegrass	Endangered
Adder's Mouth Orchid	

Amphibians and Reptiles

Jefferson Salamander	Special Concern
Spotted Turtle	Special Concern
Eastern Hognose Snake	Special Concern
Eastern Spadefoot	Special Concern
Worm Snake	Special Concern

Birds

Sharp-Shinned Hawk	Special Concern
Cooper's Hawk	Special Concern
Golden-Winged Warbler	Special Concern
Yellow-Breasted Chat	Special Concern
Whip-Poor-Will	Special Concern

The classifications are defined below:

**Endangered** – Endangered Species as listed on the NYSDEC “Endangered, Threatened and Special Concern Fish & Wildlife Species of New York State” which is defined as follows: *Those endangered species which meet one or both of the criteria specified in section 182.2(g) of 6NYCRR Part 182 and which are found, have been found, or may be expected to be found in New York State*

**Threatened** – Threatened Species as listed on the NYSDEC “Endangered, Threatened and Special Concern Fish & Wildlife Species of New York State” which is defined as follows: *Those threatened species which meet one or both of the criteria specified in section 182.2(h) of 6NYCRR Part 182 and which are found, have been found, or may be expected to be found in New York State*

**Special Concern** – Species of Special Concern as listed on the NYSDEC “Endangered, Threatened and Special Concern Fish & Wildlife Species of New York State” which is defined as follows: *Species of special concern warrant attention and consideration but current information, collected by the department, does not justify listing these species as either endangered or threatened.*

**Plant Endangered** – Plants having a NY State Status of Endangered according to “New York Natural Heritage Program, Rare Plant Status Lists, May 2006”

Endangered Species are those with

- 1) 5 or fewer extant sites, or
- 2) fewer than 1,000 individuals, or
- 3) restricted to fewer than 4 U.S.G.S. on a 7 1/2 minute topographical maps, or
- 4) species listed as endangered by the U. S. Department of Interior, as enumerated in the Code of Federal Regulations 50 CFR 17.11.

**Plant Threatened** – Plants having a NY State Status of Threatened according to New York Natural Heritage Program, Rare Plant Status Lists, May 2006,

Threatened: species are those with

- 1) 6 to fewer than 20 extant sites, or
- 2) 1,000 to fewer than 3,000 individuals, or
- 3) restricted to not less than 4 or more than 7 on a U.S.G.S. 7 1/2 minute topographical maps, or
- 4) listed as threatened by the U. S. Department of the Interior, as enumerated in the Code of Federal Regulations 50 CFR 17.11.

**Plant Rare** – Plants having a NY State Status of Rare according to New York Natural Heritage Program, Rare Plant Status Lists, May 2006,

Rare species have

- 1) 20 to 35 extant sites, or
- 2) 3,000 to 5,000 individuals statewide.

### **C. PLANTS SPECIES**

In order to supplement the environmental impact statement, consistent with the Decision, Dr. Futyma reanalyzed whether any of the plant species identified in II(B) above, were present on the Site and determined if the Project would have a significant adverse environmental impact on such species which may be in the vicinity of the Site. Dr. Futyma's supplemental report is attached as Appendix SDIII. Dr. Futyma found that none of the plants were located on the Site and that the Project would have no significant adverse environmental impact on such species which may be in the vicinity of the Site.

The supplemental report prepared by Dr. Futyma, dated July 23, 2007, reviewed all plant species identified in II(B) above and those plant species identified by the Natural Heritage Program and says in part:

"In conclusion, neither the open, gravel covered area nor the wooded area constitute suitable or critical habitat for any of these seven species. The limited area of open sandy soil does not contain *Cyperus schweinitzii* or *Scleria triglomerata*. I am very familiar with the proposed hotel project site and have had occasion to examine the properties surrounding it. I have reviewed the site plan on many occasions and used this plan while conducting numerous site visits to evaluate whether the project may have an adverse impact on any rare, threatened or endangered species that might be located on or in the vicinity of the site."

The supplemental report continues:

"In my opinion, the project will have no impact on these seven species, adverse or otherwise. In addition, given the findings of my intensive studies of the site,



the project will have no adverse impacts on any rare, threatened or endangered plant species located in the Albany Pine Bush.”

#### **D. AMPHIBIAN AND REPTILE SPECIES**

In order to further supplement the environmental impact statement, consistent with the Decision, B. Laing Associates, Inc. visited and evaluated the Site and its surroundings for endangered, threatened, rare or special concern amphibian and reptile species and found that the Site did not possess such species or contain suitable habitat for such species and that the Project would have no significant adverse environmental impact on any of such species identified in II(B) and by the Natural Heritage Program which may be in the vicinity of the Site. (see Appendix SDIV) The B. Laing Report concludes:

##### Eastern Hognosed Snake (Special Concern)

The proposed Residence Inn site does not provide adequate or suitable habitat for the eastern hognose snake. There are a lack of wetlands in proximity and, therefore, limited possible food sources for the snake. Little to no suitable habitat exists on-site or in the vicinity for the eastern hognose snake. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential, significant adverse impacts to the snake as a result of the Project.

##### Worm Snake (Special Concern)

The preferred habitat for the snake is a sandy soil area within or bordering damp woodlands or streams. The site does not provide the habitats typical of the worm snake. No wetlands or streams occur on-site. The closest waters are eastward, 600 plus feet across Washington Avenue Extension and are in the form of relatively permanent “water body” in a storm basin. Worm snakes are intolerant of dry conditions and often disappear from areas that have been cleared of vegetation. Little to no suitable habitat exists on-site or in the vicinity for the worm snake. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the snake as a result of the Project.

##### Eastern Spadefoot Toad (Special Concern)

The Residence Inn site does not provide adequate or suitable habitat for the eastern spadefoot toad. The eastern spadefoot feeds on toads and frogs. The most abundant occurrence of their prey would be in proximity to wetlands. In the absence of wetlands on or near the site, the existing site does not provide any breeding habitat or good habitat for those prey species and, thus, there is likely to be very limited prey/food for the toad. Little to no suitable habitat exists on-site or in the vicinity for the eastern spadefoot toad. Further, this species was not observed on-site or in the vicinity of the

site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the toad as a result of the Project.

Spotted Turtle (Special Concern)

The Residence Inn site does not provide adequate or suitable habitat for the spotted turtle. The preferred habitat for the turtle is wetlands or wet areas. The site does not provide these habitats. No wetlands, streams, ponds or water, occur on or near the site. The closest "waters" are eastward, 600 plus feet across Washington Avenue Extension and are in the form of a storm basin associated with a shopping center. No surface waters occur to the west for at least 6,000. Little to no suitable habitat exists on-site or in the vicinity for the spotted turtle. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the turtle as a result of the Project.

Jefferson Salamander (Special Concern)

The Residence Inn site does not provide adequate or suitable habitat for the Jefferson salamander. The preferred habitat for this species is forests near swamps and ponds. The site does not contain any wet areas or ponds. No wetlands, streams, ponds or waters occur on or near the site. The closest "waters" are eastward, 600 plus feet across Washington Avenue Extension and are in the form a storm basin associated with a shopping center. No surface waters occur to the west for at least 6,000. Little to no suitable habitat exists on-site or in any reasonable vicinity for the Jefferson salamander. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the salamander as a result of the Project.

**E. AVIAN SPECIES**

In order to further supplement the environmental impact statement, consistent with the Decision, B. Laing Associates, Inc. visited and evaluated the Site and its surroundings for endangered, threatened, rare or special concern avian species and found that the Site did not possess such species or contain suitable habitat for such species and that the Project would have no significant adverse environmental impact on any of such species identified in II(B) and by the Natural Heritage Program which may be in the vicinity of the Site. (see Appendix SDIV) The B. Laing Report concludes:

Sharp-Shinned Hawk (Special Concern)

The Residence Inn site does not provide adequate or suitable habitat for the sharp-shinned hawk. The preferred habitat for the hawk is open woodlands and wood margins. They generally do not occur in small woodlots like the subject property. Little

to no suitable habitat exists on-site or in the vicinity for sharp-shinned hawk. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. None were observed or heard to occur. Thus, there are no potential adverse impacts to the hawk as a result of the Project. However, the species is not entirely adverse to development. In fact, as previously mentioned, sharp-shinned hawks have been observed by the author at mall locations feeding on pigeons.

Cooper's Hawk (Special Concern)

The Residence Inn site does not provide adequate or suitable feeding or breeding habitat for the Cooper's hawk. The preferred habitat for the hawk is open woodlands and wood margins. They generally do not occur in small woodlots like the subject property. Little to no suitable habitat exists on-site or in the vicinity for Cooper's hawk. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. None were observed or heard to occur. Thus, there are no potential adverse impacts to the hawk as a result of the Project.

Golden-Winged Warbler (Special Concern)

The Residence Inn site does not provide adequate or suitable habitat for the golden-winged warbler. The preferred habitats for the warbler are shrubby areas produced by secondary succession and forest edges. The north, west and southwest half of the 3.6-acre site is forested (approximately 1.8 acres) and the northeast, east and southeast half of the site is open and covered with gravel. Neither is a shrubby habitat. The warbler also inhabits areas of marshes and bogs. The site does not have any wet areas. Little to no suitable habitat exists on-site or in the vicinity for golden-winged warbler. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. None were observed or heard to occur. Thus, there are no potential adverse impacts to the warbler as a result of the project.

Yellow-Breasted Chat (Special Concern)

The Residence Inn site does not provide adequate or suitable habitat for the yellow-breasted chat. The preferred habitats for the chat are low, dense deciduous and coniferous vegetation and dense second-growth, riparian thickets, and brush. Little to no suitable habitat exists on-site or in the vicinity for yellow-breasted chat. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. None were observed or heard to occur. Thus, there are no potential adverse impacts to the warbler as a result of the Project.

Whip-Poor-Will (Special Concern)

The Residence Inn site does not provide possible suitable habitat for the whip-poor-will. The bird inhabits forests with certain specific tree species which have been identified on-site. During Dr. Futyma's visits in June and July of 2004 and July of 2007, he observed oak trees, gray birch, white pine and pitch pine on-site. These tree species are representative of the mixed forests that whip-poor-wills inhabit. However, the wooded portion of the site also contains numerous shrub and herbaceous species. The presence of the well developed understory precludes the presence of the whip-poor-will. This avian species also inhabits wooded areas near fields. It is possible that the whip-poor-will would utilize the National Grid transmission ROW (west and south of the project site) as suitable habitat. No suitable habitat exists on-site for the whip-poor-will. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. None were observed or heard to occur. Thus, there are no potential adverse impacts to the whip-poor-will as a result of the Project.

#### **F.    INVERTABRATE SPECIES**

In order to further supplement the environmental impact statement, consistent with the Decision, B. Laing Associates, Inc. visited and evaluated the Site and its surroundings for endangered, threatened, rare or special concern invertebrate species and found that the Site did not possess such species or contain suitable habitat for such species and that the Project would have no significant adverse environmental impact on any of such species identified in II(B) and by the Natural Heritage Program which may be in the vicinity of the Site. (see Appendix SDIV) The B. Laing Report concludes:

##### Frosted Elfin (Threatened)

The Frosted Elfin was reevaluated based on the Decision to ensure a comprehensive review. The B. Laing Report concludes that the Residence Inn site does not provide adequate or suitable habitat for the frosted elfin. The elfin relies on specific host plants which the caterpillar feeds on. These plants include lupines, false indigo and rattlebox. None of these plants have been identified on-site. No suitable habitat exists on-site for the frosted elfin. Further, this species was not observed on-site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the frosted elfin as a result of the Project.

##### Henry's Elfin

The Residence Inn site does not provide adequate or suitable habitat for Henry's elfin. The elfin relies on specific host plants which the caterpillar feeds on. These plants include high bush blueberry (*Vaccinium corymbosum*), redbud (*Cercis canadensis*), huckleberry (*Gaylussacia sp.*), wild plum (*Prunus sp.*) and Texas persimmon (*Diospyros virginiana*). Only low-bush blueberry has been identified on-site. Little to no suitable habitat exists on-site or in the vicinity for Henry's elfin. Further, this

species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the butterfly as a result of the project.

Mottled Duskywing Skipper

A very limited patch of one of the food sources for this species is located on the northern part of the site. The project site consists of wooded uplands which are one ecological community the duskywing inhabits. However, the wooded portion of the site also contains numerous shrub and herbaceous species which do not constitute appropriate habitat. The presence of the well developed understory significantly inhibits the presence of the duskywing even if it were located in the vicinity of the site. B. Laing Associates also did not locate the species on or in the vicinity of the site during its site visits. The Natural Heritage Program report did not list this species as being possibly located on or in the vicinity of the site. There are no potential adverse impacts to the duskywing as a result of the project.

Edwards' Hairstreak

The Residence Inn site does not provide adequate or suitable habitat for the Edwards' hairstreak. The preferred habitat for the butterfly is dense scrub oak/pitch pine thickets. This habitat does not occur on-site. No suitable habitat exists on-site for the Edwards' hairstreak. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in June and July of 2007. Thus, there are no potential adverse impacts to the butterfly as a result of the Project.

Bird Dropping Moth

The bird dropping moth is not listed by New York State as endangered, threatened or of special concern. It is ranked, however, as critically imperiled. Critically imperiled species are those that have 5 known or fewer locations in the state. Little information is available for this species and, so, habitat and needs is not described herein. Most larvae feed on plant foliage, dead leaves, lichens, and fungi. This species was not observed on-site or in the vicinity of the site during sampling events conducted by B. Laing Associates, Inc. in May, June and July of 2007. Thus, there are no potential adverse impacts to the butterfly as a result of the Project.

Noctuid Moths

The Residence Inn site does not provide adequate or suitable habitat for the noctuid moth. The preferred habitat for the moth is wetlands, wet meadows and boggy areas. The site and its surroundings do not contain wetlands. No suitable habitat exists on-site for the noctuid moth. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted between May and July of 2007. Thus, there are no potential adverse impacts to the butterfly as a result of the Project.

Inland Barrens Buckmoth

The Residence Inn site does not provide adequate or suitable habitat for the inland barrens buckmoth. The preferred habitat for the moth is scrub oak and Pine Barrens. The subject site is composed of both forest and gravel areas. No suitable habitat exists on-site for the inland barrens buckmoth. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the buckmoth as a result of the Project.

**G. CONCLUSION/ MITIGATION**

Since no significant adverse environmental impacts have been identified regarding rare, threatened, endangered, and special concern plant and animal species located in the Albany Pine Bush have been identified, no additional mitigation measures are proposed concerning rare plant and animal species.

### III. AGENCY REVIEW

Since the adoption of the Lead Agency Findings Statement additional discussions have taken place between the Applicant and the United States Fish & Wildlife Service and the New York State Department of Environmental Conservation. The USFWS visited the Site together with Dr. Futyma and other representatives. Dr. Futyma's report regarding the site visit is included in Appendix SDVI. USFWS indicated that the Applicant has performed a substantial amount of coordination between the USFWS and NYSDEC regarding:

[D]evelopment of a project plan that will avoid the potential take of Karner blue butterflies. This plan involves two components: deterring Karner blue butterflies from flying into unsuitable habitat (where the proposed hotel and parking lot will occur) and restoration and management of habitat to maintain (at a minimum) or enhance (ideally) survival and reproductive success of the Pine Bush Southeast population of the Karner blue butterfly. To accomplish the first goal, the [Applicant] has agreed to establish an 8-foot stockade fence along the southern and eastern perimeter of the property. To accomplish the second goal, the [Applicant] has agreed to transfer 0.25 acre of the site to the NYSDEC or [Commission] for Karner blue butterfly habitat management; selectively remove white pine trees along the border of the project area; and establish a fund to allow for restoration and management of habitat for Karner blue butterflies.

These measures agreed to are similar to the measures identified and imposed by the Common Council during the earlier environmental review process, except USFWS requested a higher and longer perimeter fence and the selective removal of white pines. Regarding funding, the Applicant committed to funding \$15,500 per acre (3.60 acres) or \$55,800. The USFWS and NYSDEC have requested that an annual monetary contribution for future maintenance of a migration corridor be made. The Applicant has agreed to commit to funding with the final amount to be finally negotiated. (see Appendix SDV)

RESIDENCE INN                      THARALDSON DEVELOPMENT COMPANY  
124-128R WASHINGTON AVENUE EXTENSION    ALBANY, NEW YORK

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**APPENDIX SDI**

Decision & Order  
Index No. 1783-06  
RJI No.: 01-06-085081  
Save the Pine Bush Inc., et al.

v

The Common Council of the City of Albany and Tharaldson Development Co.



PRESENT: HON. THOMAS J. McNAMARA  
Acting Justice  
STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY

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In the Matter of the Application of  
SAVE THE PINE BUSH INC., LYNNE JACKSON,  
REZSIN ADAMS, JOHN WOLCOTT, LUCY CLARK,  
SANDRA CAMP, DAVE CAMP, LARRY LESSNER,  
RUSSELL ZIEMBA and ANNE SOMBOR,

Petitioners,

**DECISION & ORDER**

Index No.: 1783-06

RJI No.: 01-06-085081

-against-

THE COMMON COUNCIL OF THE CITY OF ALBANY  
and THARALDSON DEVELOPMENT CO.

Respondents.

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(Supreme Court, Albany County, Motion Term)

APPEARANCES: Stephen F. Downs, Esq.  
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City of Albany Corporation Counsel  
*Attorneys for Respondent-City of Albany Common Council*  
(By: Terrence A. Gorman, Esq.)  
City Hall  
Albany, New York 12207

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McNamara, J.

On September 10, 2003, respondent Tharaldson Development Co., applied to the City of Albany for a zoning change on a 3.60 acre plot of land at 124-128R Washington Avenue Extension.

The application sought a change in zoning from R-1B (Single Family Medium Density Residential) to C-2 (Highway Commercial) to facilitate construction of a 124-unit hotel on the site. After the zoning application was received, the Common Council introduced an ordinance regarding the zoning change and referred it to the Zoning Committee for review. The Common Council assumed lead agency status pursuant to the State Environmental Quality Review Act (ECL art 8 [SEQRA]), determined that the project may have a significant adverse impact on the environment and directed preparation of a Draft Environmental Impact Statement (DEIS). The Common Council also determined to conduct scoping for the project and a draft scoping checklist was prepared and subjected to public comment. Thereafter, the DEIS was received, reviewed and accepted by the Common Council. A public hearing to consider the DEIS was conducted on April 18, 2005. The public comment period on the DEIS was closed on May 19, 2005. A Final Environmental Impact Statement (FEIS), which included responses to the comments received on the DEIS, was then prepared. The Zoning Committee conducted meetings to consider the FEIS and allow for public comment. At the second such meeting, held in November 2005, a resolution determining that the FEIS was complete was adopted by the committee. On November 21, 2005 the Common Council determined that the FEIS was complete and the following month the Zoning Committee conducted a meeting and invited additional public comment on the draft SEQRA Findings Statement. The committee also passed a resolution recommending adoption of the Findings Statement and rezoning of the site. On December 19, 2005 the Common Council accepted the SEQRA Findings Statement and enacted an ordinance rezoning the site from R-1B to C-2. Petitioners then brought this proceeding pursuant to CPLR article 78 to challenge the determination as contrary to the

requirements of SEQRA.

The parcel was sold by Pyramids Crossgates Company to the developer<sup>1</sup> in December 2004. A portion of the parcel had been cleared of vegetation in 1998, covered with gravel and used for parking. The main thrust of the challenge to the SEQRA determination involves the question of the impact of the proposed project on the continued survival of the Karner blue butterfly and other rare plants and animals in the Albany Pine Bush. The Karner blue is listed as an endangered species by the federal and state governments and extensive efforts have been made to preserve habitat essential to its continued existence. Extensive efforts have been made by government and interested organizations and individuals toward preserving the Albany Pine Bush: an inland pitch pine-scrub oak barrens. The project site, though not part of the Albany Pine Bush Preserve, is adjacent to an area known as Butterfly Hill which contains one of three sub-populations of Karner blue butterflies in the Pine Bush Preserve and the only sub-population south of the New York State Thruway. The significance of that fact is found in the Albany Pine Bush Preserve Commission's 2002 Management Plan which concludes that successful recovery of the Karner blue butterfly in New York depends upon establishing two viable populations in the Albany Pine Bush, one north of the Thruway and one south of the Thruway. None of the existing sub-populations is currently considered viable. Despite this, the site is not, as noted, part of the Albany Pine Bush Preserve and was not identified in either the Albany Pine Bush Preserve Protection and Project Review Implementation Guidelines (1996) or the Management Plan Final Environmental Impact Statement for the Albany Pine Bush Preserve

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<sup>1</sup>The property was transferred by deed to R.I. Heritage Inn of Albany, L.L.C. an entity wholly owned by respondent Tharaldson Development Co.

(2002) as necessary in providing any ecological functions or as essential to butterfly recovery or viability.

Judicial review of an agency's SEQRA determination is limited to an assessment of "whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688 [1996]). The question for the court is "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). It is not the role of the court to second-guess the agency's determination or to substitute its judgment for the conclusions reached by the agency (*Matter of Anderson v Lenz*, 27 AD3d 942 [2006]).

Petitioners' initial contention is addressed to an issue raised by the United State Fish and Wildlife Service (USFWS) in commenting on the DEIS. In the letter, dated April 18, 2005, the USFWS advised the Common Council that it, the USFWS, had determined that the Karner blue butterfly was likely to use the proposed project area, noted that it would like to visit the site and requested that the Common Council withhold final approval for the project until USFWS concerns were resolved.

Petitioners maintain that the Common Council ignored the request and failed to give a reasoned elaboration for ignoring the preliminary determination by USFWS that the Karner blue was likely to use the site. Petitioners also argue that the Common Council failed to take a hard look at the issue as evidenced by a statement in the FEIS that if a site visit is deemed necessary the applicant

would have to cooperate.

The Common Council provided a lengthy response to the USFWS comment in the FEIS and also addressed the issue in the Findings Statement. In addressing this issue, the FEIS relied on a two reports by Dr. Richard Futyma, a biologist. In the reports, made after studying the site, Futyma concluded that there was a lack of evidence that the Karner blue used the site in any way and consequently, development of the site would not require a 'taking' permit.

Although the concern raised by USFWS was made in response to the DEIS which utilized the Futyma report, the record does not show that USFWS visited, or attempted to visit, the site in the months between April 2005 when the letter was sent and November 2005 when the FEIS was determined to be complete. The USFWS did not, as far as the record shows, take further action to test its belief that the site might be used by the Karner blue. And, the USFWS had noted in its April 2005 comment that if the project site was not being used by the Karner blue, the USFWS did not anticipate direct impacts on the species.

The Common Council took the requisite hard look at the taking issue raised by the USFWS. Its determination that no taking would occur was not arbitrary and capricious as it properly explained that it was relying on Futyma's reports as the basis for its conclusion. Moreover, in the absence of some contrary proof, its conclusion does not constitute error as a matter of law.

Petitioners also argue that the Common Council made no significant findings on the impact the project would have on the Karner blue population at Butterfly Hill which is part of the Butterfly Management Area jointly administered by the New York State Department of Environmental Conservation (NYSDEC) and the Albany Pine Bush Preserve Commission (APBPC). The sub-

population at Butterfly Hill which is less than 100 meters from the proposed hotel. According to petitioners, the Findings Statement does not reflect the disagreement about the impact or the reasons for choosing Futyma's conclusions over those of others including interested agencies.

As the last statement indicates there is disagreement about the impact of the project on the sub-population of Karner blue butterflies at Butterfly Hill. The Common Council as the lead agency determined that the project would not have an adverse effect. That determination can only be challenged on the bases that the Common Council failed to take a hard look at the issue or failed to provide a reasoned elaboration for the choice it made.

The FEIS contains a fair amount of discussion on this issue. Reference is made not only to the reports by Futyma but also to the 1996 Implementation Guidelines, the 2002 Management Plan, the Federal Recovery Plan and the Population Monitoring Report. In addition, the issue is addressed in the Findings Statement. These discussions show that a hard look was taken at the issue and provide the reasoned elaboration for the choice made.

Another issue raised in the petition is whether an appropriate amount of attention was given to the potential impact of the proposed project on other rare, threatened and endangered species found in the Preserve. In September 2004, in comments it offered on the Draft Scoping Checklist, the NYSDEC noted the importance of performing a detailed evaluation of the potential site use by the Karner blue butterfly. The NYSDEC also pointed out that the Karner blue is only one species in a rare habitat that is known to support numerous rare or unusual species. It was suggested that the biological evaluation also include these other rare species including but not limited to the Hognosed Snake, Worm Snake, Eastern Spadefoot Toad and Frosted Elf.

In its April 18, 2005 letter commenting on the DEIS the USFWS, after noting that the Karner blue butterfly was the only Federally-listed species to occur in the vicinity, remarked that the State-listed threatened Frosted elfin butterfly is present on the management area adjacent to the proposed project site. USFWS recommended that the applicant coordinate with certain agencies to determine whether any other State-listed species or species of concern may occur within the vicinity and whether the proposed project might impact such species.

In its April 25, 2005 comments on the DEIS, the APBPC noted that the Albany Pine Bush is home to 19 rare plant and animal species.

In the Findings Statement the Common Council concluded that “[e]cological reports performed in 2000 and 2004, confirmed that no Karner Blue Butterflies or any other State of (sic) Federal threatened or endangered species, are located on the Site or likely to use the Site. The Management Plan, Implementation Guidelines and 2002 Management Plan likewise conclude no Karner Blue Butterflies exist on the Site.” The response in the FEIS to the USFWS’s April 18, 2005 letter commenting on the DEIS claims that the project site, and surrounding areas, were evaluated for the presence of the Frosted elfin and any other State or Federal List rare, threatened or endangered species and Dr. Futyma found no such plants or animals on the project site.

In his 2000 report, Futyma indicates that he did not find any Federal or State-listed plant species on the site and did not observe any habitats that are known to be of particular importance to any rare, threatened or endangered animal species. In his 2005 supplemental report, Futyma provides an exhaustive list of plants he observed during his five visits to the site in June and July 2004 and concludes that none of the plants or animals identified on the project site are listed by New York

State or the Federal government as rare, threatened, or endangered species. Also in his July 2005 supplemental report Futyma notes that his observations of animals during his 2004 site visits were confined to butterflies.

Missing from the Futyma reports are any discussion of animals, other than butterflies, which may be present on the site. And, though considerable attention was given to the impact the project may have on the off-site Karner blue butterfly population, and to a lesser extent the Frosted elfin butterfly, there is no evaluation, despite the contrary statement in the FEIS, of the impact the project may have on any of the 'rare' plant and animal species known to be present in the Albany Pine Bush particularly those specifically identified by NYSDEC and the APBPC. Consequently, with respect to this issue the environmental impact statements are deficient.

In July 1994 the NYSDEC issued a State Pollutant Discharge Elimination System (SPDES) permit to Pyramid Crossgates Company in connection with an expansion of Crossgates Mall into an area near Butterfly Hill. The permit applies to the Crossgates Mall, Karner Blue Hill Preserve (Butterfly Hill) and adjacent properties owned by, or under the control of, the permittee. Upon being advised of the proposed hotel project by the developer, the NYSDEC replied in January 2004 that two of the conditions in the permit might apply to the proposed project. Under the first condition referred to by NYSDEC, the permittee is required to submit proposed development plans and narratives to NYSDEC for prior review and if necessary, approval, for any project involving any further physical alteration of permittee owned or controlled lands adjacent to Karner Blue Hill



Preserve.<sup>2</sup> The other permit condition of concern to NYSDEC provides that at least 60 days in advance of any transfer or sale of the Preserve property, the permittee is required to apply to NYSDEC for approval of transfer of the permit. NYSDEC also noted that the permittee was required to maintain the Preserve under single ownership and that transfer of ownership of the property could be a violation of this condition in the permit as it appeared to contain a portion of the Karner Blue Hill Preserve. The site of the proposed project, as noted, was sold by Pyramid to the developer in December 2004.

In the FEIS in response to a comment inquiring as to whether the NYSDEC permit applied to the project site, it is noted, after some discussion, that no portion of the project site includes the Karner Blue Hill Preserve and that the terms of the permit have been complied with given there is no proposed development of Preserve property. In the Findings Statement the Common Council noted that the applicant does not own any portion of the Karner Hill Blue Preserve and that no development is proposed on such lands. The Common Council also determined that “[n]one of the lands proposed for development were demonstrated to be ‘permittee-owned or controlled lands adjacent of the Karner Blue Hill Preserve’”. Note is also made that the Preserve is located south of the parcels proposed to be re-zoned and concludes that the requirements of the permit are not applicable to the project site.

Again, the discussion in the FEIS and the Findings Statement are sufficient to establish that the lead agency took the requisite hard look and provided a reasoned elaboration for its conclusion.

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<sup>2</sup>According to the NYSDEC, “permittee” refers to the Pyramid Crossgates Company as well as its successors and assigns or any other person having an interest in the property.

A closer question is presented as to whether the conclusion that the requirements of the permit did not apply was erroneous as a matter of law and if so whether there was any relevant consequence to the conclusion.

According to the NYSDEC letter of January 14, 2004 the permit applies to the Crossgates Mall, Karner Blue Hill Preserve (Butterfly Hill) and adjacent properties owned by, or under the control of, the permittee. And, the permittee refers to the Pyramid Crossgates Company as well as its successors and assigns or any other person having an interest in the property. Therefore, the permit applies to lands adjacent to Butterfly Hill owned by Pyramid or an owner who derives title to such land through Pyramid.

The southwest corner of the parcel is, as shown by maps in the record, adjacent to a portion of the Karner Blue Hill Preserve. However, one of the mitigative measures required in conjunction with approving the rezoning was the commitment to NYSDEC for preservation of a 0.25 acre area of the land sold to the developer. This is the area in the southwest corner of the parcel adjacent to Butterfly Hill. The commitment of this adjacent area takes control of the area away from the owner and viewed in that context, the Common Council conclusion that the conditions in the SPDES did not apply was not erroneous as a matter of law.

The further argument offered by petitioners that the Common Council improperly overruled NYSDEC meaning of its own permit is misplaced. The January 14, 2004 letter by NYSDEC in which the permit issues were raised does not conclude that the permit has been violated or even, that it applies. Rather, the letter only raises these issues and as petitioners' other arguments show, the issue was an appropriate subject for consideration by the Common Council in assessing the

environmental impact of the project. The acceptability of the Common Council's conclusion is, therefore, determined by analyzing whether they took a hard look and offered a reasoned elaboration for the conclusion, which they did, and because the conclusion was not erroneous as a matter of law the determination cannot be disturbed. Moreover, the finding by the Common Council is not binding on the NYSDEC and that agency retains authority to take whatever action it deems appropriate with respect to the permit.

Sometime in 1998 Pyramid Crossgates cleared a portion of the site proposed for the project and covered it with gravel. Petitioners maintain that the work was done illegally in that Pyramid did not obtain site plan approval from the City of Albany as required by a local ordinance and that the act of clearing violated the terms of the SPDES permit.

Review of these issues was made by inquiring of the City Bureau of Buildings and Codes as to whether there was a record of any enforcement proceedings regarding the matter; through the involvement of the NYSDEC in evaluating the proposed project and with information provided by the developer. Based on the information received, the Common Council concluded that the act of clearing a portion of the site by the former owner was in accord with all laws, rules and regulations and that no adverse environmental impacts had been identified. The review satisfied the obligations imposed on the lead agency by SEQRA.

Petitioners also argue that the Common Council failed to make any findings as to the condition of the site before it was partially cleared. According to petitioners, if the Common Council were to find that the property, restored to its prior condition, could help support the Karner blue butterfly, that determination would have a major impact on whether the project should be approved.

*Save the Pine Bush Inc., et al. v. Common Council of the City of Albany, et al.*  
Index No.: 1783-06; RJI No. 01-06-085081

The issue was addressed in the FEIS with a comment that the precise nature of the foliage on the site prior to clearing could not be established. An examination of aerial photographs and remnants on the site indicated that it had been covered by a closed canopy forest that was not suitable habitat for Karner blue butterflies. Therefore, restoring the site would not allow for re-inhabitation. And, inasmuch as the Common Council determined that there was no evidence that the site had been illegally cleared, it would be inconsistent for them to conclude that the owner could be made to restore the site much less that doing so would help support the Butterfly Hill sub-population and provide some basis for not approving the project.

Petitioners also contend that there was an inadequate review of alternatives in the environmental impact statements. Although SEQRA requires that alternatives to the project be considered (ECL §8-0109[2][d]), the requirement is limited to “a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor” (6 NYCRR §617.9[b][5][v]).

In the context of the regulation, the alternatives were adequately addressed. The Common Council noted that while the no-action alternative would preserve the status quo the public would lose the benefits of increased job opportunities and hotel accommodations. The alternative of using the site in conformance with existing zoning, residential development would create greater demand on City provided services than the proposed project. The remaining three alternatives considered, including dedication to the Preserve, were rejected as incompatible with the objectives of the Applicant.

Previously prepared studies have concluded that an approximately 2,000 fire manageable

acres is necessary to create a viable Preserve. As a result, the issue of the necessary minimum acreage necessary to provide a viable Preserve has been found relevant and important in the review of any SEQRA action in the Pine Bush area (*Matter of Save the Pine Bush v Common Council of City of Albany*, 188 AD2d 969, 970-971 [1992]). In the FEIS the expansion of the City owned landfill on Rapp Road is identified as having a significant cumulative impact on creating a viable Preserve. The issue, however, was not addressed further because the Common Council concluded that no application to expand the landfill had been filed as of the date of the FEIS, December 19, 2006. Petitioners point out the City filed a permit application regarding expansion of the landfill with NYSDEC on November 16, 2006. Less than a month later, and before the FEIS was complete, the application was suspended and then was formally withdrawn the following month. Consequently, the error is without effect and that issue is moot.

Nonetheless, petitioners' have expressed concern that the City is not adhering to representations previously made regarding land in the Pine Bush to be dedicated to the Preserve. In particular, petitioners fear that the City will use land previously dedicated to the Preserve to accomplish expansion of the Rapp Road landfill and have requested that the City be enjoined from approving any further development in the Pine Bush until it adopts a plan, approved by the courts, ensuring that land dedicated to the Preserve will not be withdrawn and used for other City purposes.

Petitioners have not established the existence of a plan by the City to withdraw previously dedicated land and an injunction may not be issued based on fear and speculation. In addition, any withdrawal of land from dedication to the Preserve for some other use by the City would be subject to some level of review under SEQRA. That process would afford petitioners the opportunity to

challenge any threat such action might pose to the creation of a viable Preserve.

Based upon the absence in the environmental impact statements of a hard look at the potential impact of the action on the range of rare plant and animals found in the Albany Pine Bush, the determination of the City of Albany Common Council pursuant to the SERQA is vacated, the ordinance rezoning the site of the proposed project is annulled and the matter is remitted to the Common Council. The application for a preliminary injunction is denied as moot.

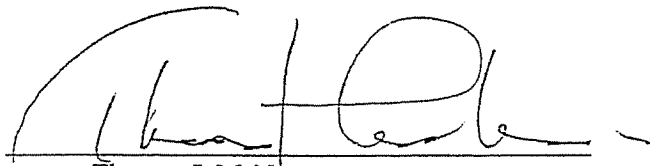
All papers including this Decision and Order are returned to Petitioner's attorneys. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

This memorandum shall constitute both the Decision and Order of this Court.

SO ORDERED.

ENTER.

Dated: Saratoga Springs, New York  
February 7, 2007



Thomas J. McNamara  
Acting Supreme Court Justice

Papers Considered:

- 1) Amended Petition verified by Lynne Jackson on May 5, 2006;
- 2) Answer of Respondent Tharaldson Development by Thomas A. Shepardson, Esq., sworn to November 1, 2006;
- 3) Answer of Respondent Common Council of the City of Albany by Terrence A. Gorman verified on November 1, 2006;
- 4) Order to Show Cause dated March 15, 2006;
- 5) Affirmation of Stephen F. Downs, Esq., dated March 12, 2006;

- 6) Affidavit of Lynne Jackson sworn to March 13, 2006;
- 7) Exhibits to Jackson Affidavit (1-17);
- 8) Order to Show Cause dated September 28, 2006;
- 9) Affirmation of Stephen F. Downs, Esq., dated September 24, 2006 with exhibits annexed;
- 10) Affirmation of Terrence A. Gorman, Esq., dated September 27, 2006 with exhibit annexed;
- 11) Affidavit of Thomas A. Shepardson, Esq., sworn to September 27, 2006 with exhibits annexed;
- 12) Affirmation of Stephen F. Downs, Esq., dated October 7, 2006 with exhibits annexed;
- 13) Affidavit of Dr. Richard Futyma sworn to October 9, 2006 with exhibits annexed;
- 14) Affidavit of Richard H. Larson Sworn to October 10, 2006;
- 15) Affidavit of Daniel F. Herring sworn to November 1, 2006;
- 16) Affidavit of Thomas S. Shepardson, Esq., sworn to November 1, 2006 with exhibit annexed;
- 17) Appendix of Cases dated November 1, 2006;
- 18) Affirmation of Stephen F. Downs, Esq., dated November 15, 2006 with exhibits annexed;
- 19) Affirmation of Thomas A. Shepardson, Esq., dated November 21, 2006 with exhibit annexed.
- 20) Respondent's Record on Appeal dated November 1, 2006 Volumes I through VIII.

**APPENDIX SDII**

Table 4  
Albany Pine Bush Commission  
Final Environmental Impact Statement  
and Management Plan  
April 2002



heritage data and by including declining and vulnerable species identified by the Albany Pine Bush Preserve Commission, The Nature Conservancy and/or Partners in Flight. The association between rare, declining and vulnerable species and ecological communities in the Albany Pine Bush is shown in Table 4. Pine barrens communities hold the greatest number of rarities, though there are several rare plant and animal species within the forest and wetland communities as well.

Table 4. Rare, Declining and Vulnerable Species within the Ecological Communities of the Albany Pine Bush.

ECOLOGICAL COMMUNITIES	RARE, DECLINING AND VULNERABLE SPECIES
Pitch pine-scrub oak barrens Pine Barrens Vernal Pond Pitch Pine-Scrub Oak Barrens Pitch Pine-Scrub Oak Forest Pitch Pine-Scrub Oak Thicket	<p style="text-align: center;"><i>Invertebrates</i></p> Barrens Dagger Moth A Noctuid Moth ( <i>Apharetra dentate</i> ) Dusted Skipper Broad-Lined Catopyrha Bird Dropping Moth A Noctuid Moth ( <i>Chaetagnalea cerata</i> ) A Noctuid Moth ( <i>Chytonix sensilis</i> ) Mottled Duskywing Skipper Inland Barrens Buckmoth Henry's Elfin Frosted Elfin Barrens Itame Karner Blue Butterfly A Noctuid Moth ( <i>Macrochilo bivittata</i> ) Edwards' Hairstreak Pine Barrens Zanclognatha <p style="text-align: center;"><i>Plants</i></p> Yellow Giant-Hyssop Side-Oats Grama Schweinitz's Flatsedge Bayard's Malaxis Virginia False Gromwell Slender Marsh Bluegrass <p style="text-align: center;"><i>Amphibians and Reptiles</i></p> Jefferson Salamander Spotted Turtle Eastern Hognose Snake Eastern Spadefoot Worm Snake Fowler's Toad

Table 4. (Cont.).

ECOLOGICAL COMMUNITIES	RARE, DECLINING AND VULNERABLE SPECIES
	<p style="text-align: center;"><i>Birds</i></p> <p>Prairie Warbler            Sharp-Shinned Hawk            Cooper's Hawk            Wood Thrush            Blue-Winged Warbler            Golden-Winged Warbler            Black-Throated Blue Warbler            Yellow-Breasted Chat            Whip-Poor-Will</p>
<p><i>Forests</i></p> <p>Appalachian oak-pine forest            Pine-northern hardwood forests</p>	<p style="text-align: center;"><i>Birds</i></p> <p>Sharp-shinned Hawk            Cooper's Hawk            Wood Thrush            Blue-winged Warbler            Golden-winged Warbler            Black-throated Blue Warbler            Yellow-breasted Chat</p>
<p><i>Wetlands</i></p> <p>Pine Barrens Vernal Pond            Red Maple Hardwood Swamp            Shallow Emergent Marsh</p>	<p style="text-align: center;"><i>Amphibians and Reptiles</i></p> <p>Jefferson Salamander            Spotted Turtle            Eastern Hognose Snake            Eastern Spadefoot            Fowler's Toad</p>

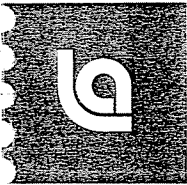
The Karner blue butterfly (*Lycaeides melissa samuelis*) is the most well known rare species in the Albany Pine Bush. The NYSDEC listed the Karner blue as a state endangered species in 1977. On December 27, 1992, the United States Fish and Wildlife Service designated the Karner blue butterfly a federal endangered species pursuant to the Endangered Species Act of 1973 (57 Federal Register 59236, 1992). Listing of the Karner blue was prompted by the observed dramatic decline in the populations of the butterfly throughout its range. Karner blue butterflies have declined regionally and in the Albany Pine Bush by over 90 percent within the past 20 years. This decline has been largely attributed to loss of habitat to development and fire suppression due to the proximity of development (Schweitzer, 1985;

RESIDENCE INN                      THARALDSON DEVELOPMENT COMPANY  
124-128R WASHINGTON AVENUE EXTENSION    ALBANY, NEW YORK

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**APPENDIX SDIII**

SUPPLEMENTAL REPORT FROM DR. RICHARD FUTYMA



the LA group

Landscape Architecture  
and Engineering, P.C.

40 Long Alley  
Saratoga Springs  
New York 12866

P 518/587-8100  
F 518/587-0180  
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July 23, 2007

Daniel R. Hershberg  
Hershberg & Hershberg Consulting Engineers  
and Land Surveyors  
18 Locust Street  
Albany, NY 12203

**Re: Supplemental Evaluation of Residence Inn site of Tharaldson Development Company, Washington Avenue Extension, City of Albany, NY, for rare, threatened and endangered plant species**

Dear Dan:

On July 12, 2007, I visited the proposed Residence Inn site to search for any occurrence of rare, threatened, or endangered plant species. As you had requested, I paid particular attention to the following seven plants, which have been reported to occur in the Albany Pine Bush: Bayard's adder's mouth orchid (*Malaxis bayardii*) (endangered), yellow giant hyssop (*Agastache nepetioides*) (threatened), side-oats grama (*Bouteloua curtipendula* var. *curtipendula*) (endangered), Schweinitz's flatsedge (*Cyperus schweinitzii*) (rare), Virginia false gromwell (*Onosmodium virginianum*) (endangered), slender marsh bluegrass (*Poa paludigena*) (endangered), and whip nutrush (*Scleria triglomerata*) (threatened).

During my examination of the site and its surroundings, I carefully traversed and examined all portions of it to determine whether these species, or other rarities exist there. I did not find any of those species, nor any other species that is listed by the federal or state government as threatened or endangered. I did find a number of rather common species that I had not noted during my previous visits to the site. Therefore, I have updated my list of the flora of the site, a copy of which is attached.

Two of the species listed above, *Malaxis bayardii* and *Poa paludigena*, are inhabitants of bogs and wet woodlands. Habitats of that sort do not occur on or adjacent to the project site. Three others, *Agastache nepetioides*, *Bouteloua curtipendula* var. *curtipendula*, and *Onosmodium virginianum* are plants of dry, open, woods. In contrast, the woods on site have a closed canopy and are on the mesic to slightly moist side. Therefore, the proper habitat conditions for five of the seven species do not exist on the site.

I have reviewed the letter from the New York State Department of Environmental Conservation, New York Natural Heritage Program, dated July 9, 2007. According to this letter, the Natural Heritage Program files do not include any records of these seven species occurring on or in the vicinity of the site, except for *Cyperus schweinitzii* and *Scleria triglomerata*. The Schweinitz's flatsedge (*Cyperus schweinitzii*), a state-listed

Daniel R. Hershberg

July 23, 2007

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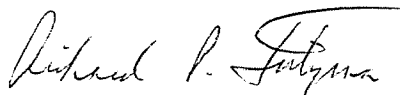
rare species, is noted to be located near Rapp Road approximately a quarter mile from the site. I am familiar with this species, and I know that it prefers dry, open, sandy soil. *Scleria triglomerata*, which was last found in the Pine Bush in 1937, also prefers sandy soil and pine barrens. There is a very limited area of that type of soil on this site; I examined that area closely and did not find any evidence of *Cyperus schweinitzii* or *Scleria triglomerata*.

In conclusion, neither the open, gravel-covered area nor the wooded area constitute suitable or critical habitat for any of these seven species. The limited area of open, sandy soil does not contain *Cyperus schweinitzii* or *Scleria triglomerata*. I am very familiar with the proposed hotel project site and, and have had occasion to examine the properties surrounding it. I have reviewed the site plan on many occasions and used this plan while conducting my numerous site visits to evaluate whether the project may have an adverse impact on any rare, threatened or endangered species that might be located on or in the vicinity of the site.

In my opinion, the project will have no impact on these seven species, adverse or otherwise. In addition, given the findings of my intensive studies of the site, the project will have no adverse impacts on any rare, threatened or endangered plant species located in the Albany Pine Bush.

If you would like to discuss my observations on the site, or have any questions concerning my conclusions, please do not hesitate to contact me.

Sincerely,



Richard P. Futyma, Ph.D.  
Vegetation Ecologist  
for  
the L.A. Group, P.C.

**Flora of the Residence Inn Project Site**

Scientific Name	Common Name
<b>Trees</b>	
<i>Acer negundo</i>	box-elder
<i>Acer rubrum</i>	red maple
<i>Acer saccharum</i>	sugar maple
<i>Betula populifolia</i>	gray birch
<i>Catalpa speciosa</i>	catalpa
<i>Fraxinus pennsylvanica</i>	green ash
<i>Morus sp.</i>	mulberry
<i>Nyssa sylvatica</i>	black gum
<i>Pinus rigida</i>	pitch pine
<i>Pinus strobus</i>	white pine
<i>Populus deltoides</i>	cottonwood
<i>Populus tremuloides</i>	trembling aspen
<i>Prunus serotina</i>	black cherry
<i>Pyrus communis</i>	pear
<i>Quercus prinoides</i>	dwarf chestnut oak
<i>Quercus rubra</i>	red oak
<i>Quercus velutina</i>	black oak
<i>Robinia pseudo-acacia</i>	black locust
<b>Shrubs and Vines</b>	
<i>Amelanchier sp.</i>	shadbush
<i>Celastrus orbiculata</i>	oriental bittersweet
<i>Cornus alternifolia</i>	green osier
<i>Cornus foemina</i>	gray dogwood
<i>Corylus americana</i>	hazelnut
<i>Gaylussacia baccata</i>	black huckleberry
<i>Ilex verticillata</i>	winterberry
<i>Kalmia angustifolia</i>	sheep laurel
<i>Lonicera tatarica</i>	tartarian honeysuckle
<i>Prunus virginiana</i>	choke cherry
<i>Quercus ilicifolia</i>	scrub oak
<i>Rhamnus cathartica</i>	common buckthorn
<i>Rhus hirta</i>	staghorn sumac

Daniel R. Hershberg

July 23, 2007

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Scientific Name	Common Name
<i>Rubus flagellaris</i>	prickly dewberry
<i>Rubus idaeus</i>	red raspberry
<i>Rubus occidentalis</i>	black raspberry
<i>Sambucus canadensis</i>	black elderberry
<i>Spiraea alba</i>	meadow-sweet
<i>Vaccinium angustifolium</i>	lowbush blueberry
<i>Vaccinium corymbosum</i>	highbush blueberry
<i>Vaccinium pallidum</i>	low bilberry
<i>Viburnum acerifolium</i>	maple-leaf viburnum
<i>Viburnum prunifolium</i>	sweet-haw
<i>Viburnum dentatum var. lucidum</i>	arrowwood
<i>Vitis riparia</i>	riverbank grape
<b>Herbaceous plants, Low Woody Plants</b>	
<i>Achillea millefolium</i>	yarrow
<i>Alliaria petiolata</i>	garlic mustard
<i>Ambrosia artemisiifolia</i>	ragweed
<i>Anemone quinquefolia</i>	wood-anemone
<i>Asclepias syriaca</i>	common milkweed
<i>Aster divaricatus</i>	white wood aster
<i>Athyrium filix-femina</i>	lady fern
<i>Bromus inermis</i>	smooth brome
<i>Carex brevior</i>	sedge
<i>Carex pensylvanica</i>	Pennsylvania sedge
<i>Carex swanii</i>	sedge
<i>Ceanothus americanus</i>	New Jersey tea
<i>Centaurea maculosa</i>	bushy knapweed
<i>Cichorium intybus</i>	chicory
<i>Circaea lutetiana</i>	enchanter's nightshade
<i>Clinopodium vulgare</i>	wild basil
<i>Convallaria majalis</i>	lily-of-the-valley
<i>Conyza canadensis</i>	horseweed
<i>Cyperus lupulinus ssp. macilentus</i>	cyperus
<i>Cypripedium acaule</i>	pink ladyslipper
<i>Danthonia spicata</i>	poverty-grass

Scientific Name	Common Name
<i>Daucus carota</i>	Queen Anne's lace
<i>Dianthus armeria</i>	Deptford-pink
<i>Dryopteris intermedia</i>	common wood fern
<i>Epipactis helleborine</i>	helleborine
<i>Erigeron strigosus</i>	daisy fleabane
<i>Erysimum hieracifolium</i>	tall rocket
<i>Euphorbia cyparissias</i>	cypress spurge
<i>Fragaria virginiana</i>	wild strawberry
<i>Galium mollugo</i>	white bedstraw
<i>Geranium maculatum</i>	wild geranium
<i>Glechoma hederacea</i>	ground-ivy
<i>Hemerocallis fulva</i>	orange day-lily
<i>Hieracium kalmii</i>	hawkweed
<i>Hypericum perforatum</i>	St. John's-wort
<i>Leontodon</i> sp.	hawkbit
<i>Lepidium</i> sp.	field-cress
<i>Lespedeza capitata</i>	lespedeza
<i>Leucanthemum vulgare</i>	ox-eye daisy
<i>Lotus corniculata</i>	bird's-foot trefoil
<i>Luzula campestris</i>	common wood-rush
<i>Lysimachia quadrifolia</i>	whorled loosestrife
<i>Maianthemum canadense</i>	wild lily-of-the-valley
<i>Maianthemum racemosum</i>	false Solomon's-seal
<i>Medicago lupulina</i>	black medick
<i>Melilotus alba</i>	white sweet-clover
<i>Melilotus officinalis</i>	yellow sweet-clover
<i>Monarda punctata</i>	dotted horsemint
<i>Monotropa uniflora</i>	Indian-pipe
<i>Oenothera biennis</i>	evening primrose
<i>Oenothera perennis</i>	small sundrops
<i>Onoclea sensibilis</i>	sensitive fern
<i>Osmunda cinnamomea</i>	cinnamon fern
<i>Osmunda claytoniana</i>	interrupted fern
<i>Osmunda regalis</i>	royal fern



Daniel R. Hershberg

July 23, 2007

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Scientific Name	Common Name
<i>Oxalis stricta</i>	lady's-sorrel
<i>Panicum clandestinum</i>	deer-tongue grass
<i>Penstemon digitalis</i>	false-foxglove
<i>Phytolacca americana</i>	pokeweed
<i>Plantago lanceolata</i>	narrow-leaf plantain
<i>Plantago major</i>	common plantain
<i>Polygala paucifolia</i>	fringed milkwort
<i>Potentilla recta</i>	five-fingers
<i>Potentilla simplex</i>	old-field cinquefoil
<i>Pteridium aquilinum</i>	bracken
<i>Rudbeckia hirta</i> var. <i>pulcherrima</i>	black-eyed Susan
<i>Rumex crispus</i>	curly dock
<i>Rumex obtusifolius</i>	bitter dock
<i>Saponaria officinalis</i>	bouncing-bet
<i>Schizachyrium scoparium</i>	little bluestem
<i>Setaria</i> sp.	foxtail grass
<i>Silene vulgaris</i>	bladder-campion
<i>Solidago canadensis</i>	common goldenrod
<i>Solidago juncea</i>	early goldenrod
<i>Taraxacum</i> sp.	dandelion
<i>Trifolium arvense</i>	rabbit's-foot clover
<i>Trifolium pratense</i>	red clover
<i>Verbascum thapsus</i>	mullein

**RESIDENCE INN                      THARALDSON DEVELOPMENT COMPANY**  
**124-128R WASHINGTON AVENUE EXTENSION    ALBANY, NEW YORK**

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**APPENDIX SDIV**

**REPORT ON AMPHIBIANS, REPTILES INVERTEBRATES AND AVIANS**  
**MICHAEL P. BONTJE, PRESIDENT, B. LAING ASSOCIATES, INC.,**

**ENDANGERED, THREATENED AND SPECIAL CONCERN  
ZOOLOGICAL SPECIES OF NEW YORK STATE  
FOR  
RESIDENCE INN PROJECT  
CITY OF ALBANY, ALBANY COUNTY, NEW YORK  
AUGUST 2007**

**PREPARED FOR:  
HERSHBERG & HERSHBERG  
CONSULTING ENGINEERS AND LAND SURVEYORS  
18 LOCUST STREET  
ALBANY, NY 12203-2908**

**PREPARED BY:  
B. LAING ASSOCIATES, INC  
225 MAIN STREET  
NORTHPORT, NY 11768**

ENDANGERED, THREATENED AND SPECIAL CONCERN  
 ZOOLOGICAL SPECIES OF NEW YORK STATE  
 FOR  
 RESIDENCE INN PROJECT  
 CITY OF ALBANY, ALBANY COUNTY, NEW YORK  
 AUGUST 2007

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## 1.0 INTRODUCTION

### 1.1 Existing Conditions

The Residence Inn site is located at 124-128R Washington Avenue Extension in the City of Albany, Albany County, New York. It is bordered on the south by National Grid (NIMO) transmission lines and an east-west corridor. Butterfly Hill and Crossgates mall are located south of the east west NIMO corridor. On the east the site is bordered by Frontage Road/Washington Avenue, a heavily traveled highway, and on the north by Time Warner Cable. The site is approximately 3.6 acres and is comprised of several tax lots. The subject property is divided into two ecological communities. The north, west and southwest half of the site ( $\pm 1.8$  acres) are "forested" (and, pursuant to the site plan, 0.25 acres of this area will be made available for management as part of the corridor area) and the northeast, east and southeast half of the site is open and covered with gravel. This portion of the site appears to have been previously used as a parking area, as the land is disturbed and covered in crushed rock. Several feet of cut soils are evident at the site's/parking lot's northern end. The Residence Inn would be constructed on the already disturbed soils and could potentially utilize limited portions of the forested area.

This report reviews the habitat and needs and potential significant adverse impacts of the project on 18 species. They are the mottled duskywing (*Erynnis martialis*), Henry's elfin (*Callophrys henrici*), frosted elfin (*Incisalia irus*), Edward's hairstreak (*Satyrium edwardii*), bird dropping moth (*Cerma cora*), noctuid moths (*Chytonix sp*, *Macrochilo sp* and *Zanclognatha sp*) and inland barrens buckmoth (*Hemileuca maia maia*) for insects; the Jefferson salamander (*Ambystoma jeffersonianum*), spotted turtle (*Clemmys guttata*), eastern hognose snake (*Heterodon platyrhinos*), worm snake (*Carphophis amoenus*), and eastern spadefoot toad (*Scaphiopus holbrooki*) for the amphibians and the sharp-shinned hawk (*Accipiter striatus*), Cooper's hawk (*Accipiter cooperii*), golden-winged warbler (*Vermivora chrysoptera*), yellow-breasted chat (*Icteria virens*) and whip-poor-will (*Caprimulgus vociferus*) for the birds and, finally, for the plants, Scheinitz's flatsedge (*Cyperus schweinitzii*). Several of the species reviewed in this report are a result of an endangered and threatened species request from the Natural Heritage Program. A response was received on July 12, 2007 and is attached to this report.

In response to the earlier requests and the Natural Heritage Program letter of July 12, 2007, B. Laing Associates, Inc. conducted 8 site inspections between May and July for species observations. These visits were conducted both diurnally and nocturnally to cover species activity. The zoological species identified on site are included in Table 1. No species listed in the Natural Heritage Program listed or described in this report were identified on-site during the investigations. Vegetation on-site was observed and recorded by Richard Futyma, PhD, vegetation ecologist for the LA Group, P.C. The complete plant data table can be found in his correspondence dated July 8, 2005 and July 23, 2007, addressed to Mr. Daniel Hershberg of Hershberg & Hershberg Consulting Engineers.

### 1.1.1 Vegetation

Vegetation on-site differs from the forested area to the open, paved portion of the site. The site occurs within the southeast portion of the Albany Pine Bush Study area. The forest is composed of white pine (*Pinus strobus*, FACU), red maple (*Acer rubrum*, FAC), black oak (*Quercus velutina*, U), pitch pine (*Pinus rigida*, FACU), gray birch (*Betula populifolia*, FAC), black cherry (*Prunus serotina*, FACU), cottonwood (*Populus deltoides*, FAC) and trembling aspen (*Populus sp.*). Shrubs identified in this area include tartarian honeysuckle (*Lonicera tatarica*, FACU), serviceberry (*Amelanchier Canadensis*, FAC), lowbush blueberry (*Vaccinium angustifolium*, FACU-), choke-cherry (*Prunus virginiana*, FACU) and staghorn sumac (*Rhus typhina*, U).

Vegetation in the open, disturbed areas consist of scattered weedy species such as spotted knapweed (*Centaurea stoebe*, U), clovers (*Trifolium sp.*, U), common goldenrod (*Solidago sp.*, U) and garlic mustard (*Alliaria petiolata*, FACU-).

Vegetation on-site was observed and recorded by Richard Futyma, PhD, vegetation ecologist for the LA Group, P.C. The complete plant data table can be found in his correspondence dated July 8, 2005 and July 23, 2007, addressed to Mr. Daniel Hershberg of Hershberg & Hershberg Consulting Engineers.

In total, Dr. Futyma identified 122 species of trees, shrubs and herbaceous on-site during six field inspections from June 2004 to July 2007. Only few species of shrub and few species of herbaceous vegetation were facultative wetland species. The majority of the identified plants are facultative, facultative upland and obligate upland species. Thus, the site does not provide wet soils to sustain wetland vegetative species or animal species dependent upon such conditions.

### 1.1.2 Soils

The Soil Survey for Albany County depicts the site has consisting of Colonie loam fine sand, rolling and Stafford loamy fine sand. The United States Department of Agriculture (USDA) National Resources Conservation District (NRCS) described the soils as follows:

The Colonie series consists of very deep, well drained to excessively drained soils formed in glaciolacustrine, glaciofluvial, or eolian deposits dominated by fine sand and very fine sand. Permeability is moderately rapid or rapid. Slope ranges from 0 to 60 percent. The mean annual temperature is about 49 degrees F, and the mean annual precipitation is about 37 inches.

The Stafford series consists of very deep, somewhat poorly drained soils formed in sandy glacio-lacustrine deposits. They are nearly level soils on deltas and sand plains. Saturated hydraulic conductivity is high or very high throughout the soil. Slope ranges from 0 to 3

percent. Mean annual temperature is 49 degrees F., and mean annual precipitation is 39 inches.

Soil investigations on-site determined that areas depicted as Stafford soils were, in fact, dry, high chroma upland soils. No deep, somewhat poorly drained soils were identified on-site. Bright yellow chromas (5-6) were identified from a depth of 8 inches to 18 inches on-site. No free water was observed within 18 inches of the surface even with the wet spring that has occurred this year. Thus, it was determined that no Stafford soils were present on-site. Well drained soils such as the Colonie series described above (plus the urban soils below) do occupy the site.

Soils on the gravel parking area are Udorthents – i.e., urban cut and fills. In this case, it appears that the original soils were removed to a depth of several feet and the exposed Colonie sub-soils were overlaid with gravel. Udorthents also occur as a berm along the site's southern border, adjacent to the National Grid transmission Right-of-Way (ROW). The berm is 6 to 8 feet high and consists of cut/filled "soils" and construction debris.

### *1.1.3 Hydrology*

No wetlands or hydrologic features occur on-site or adjacent to the site.



## 2.0 ENDANGERED, THREATENED AND SPECIAL CONCERN ZOOLOGICAL SPECIES OF NEW YORK STATE: REPTILES

### 2.1 Eastern Hognose Snake (*Heterodon platyrhinos*)

#### 2.1.1. *Habitat and Needs*

The eastern hognose snake is listed by New York State as a species of special concern. NYSDEC defines special concern as “any native species for which a welfare concern or risk of endangerment has been documented in New York State.” The hognose snake is a stout-bodied snake with pointed, slightly upturned snout and wide neck. The snake is found from eastern-central Minnesota to extreme southern New Hampshire south to Florida and west to east Texas and western Kansas. The snake mates in spring and fall and resides in shallow cavities in loose or sandy soil from June to July. During winter months, the snake burrows deeper into loose earth. Sandy soils are an essential habitat characteristic for hognose snakes. These snakes can be found in sandy woodlands, fields, thinly wooded upland hillsides, farmland and coastal areas. The report’s authors have encountered the snake on a number of sandy-soil sites in New York and New Jersey. All these sites had water within a reasonable proximity (50 to 200 feet). This may be due to their food preference. The hognose snake has been reported to occur in the National Grid transmission ROW “in years past.” The hognose snake mainly feeds on toads and frogs.

#### 2.1.2. *Existing Conditions On-site*

The Residence Inn site does not provide adequate or suitable habitat for the eastern hognose snake. The snake prefers sandy soil fields, woodlands and coastal areas. The Soil Survey of Albany County does depict the site as consisting of sandy soils; however, the majority of the site is currently disturbed. As previously mentioned, the easterly half of the site is open, previously disturbed and covered with gravel. In addition, the site is not located in a coastal area. No wetlands, streams, ponds or waters occur on or near the site. The closest “waters” are eastward, 600 plus feet across Washington Avenue Extension and are in the form a storm basin associated with a shopping center. No surface waters occur to the west for at least 6,000 feet. Given the presence of Washington Avenue Extension, a heavily traveled major highway that acts as a barrier, to the east and the excessive distance to the west to surface waters, any such migration is virtually impossible. The property is mostly disturbed with woodlands on the north, west and southwest half of the site. Further, the hognose snake feeds on toads and frogs. The existing site does not provide suitable habitat for those species and, thus, there is most likely limited prey/food for the hognose snake. The eastern hognose snake may be found in the Albany Pine Bush area approximately 1.65 miles to the northwest or 0.7 miles to the northeast across the heavily traveled Washington Avenue Extension and the New York State Thruway where wetlands and more suitable habitat occur. Further, it was reported that the eastern hognose snake has occurred in the National Grid Transmission

ROW (west and south of the project site) in years past. The species could have possibly existed in the ROW because of the "field" condition. The ROW is maintained as such due to the high voltage power lines. It is unlikely the snake species utilize or even migrate toward the project site since (a) a man-made berm separates the site including unsuitable habitat and (b) there is little to no suitable habitat within the Residence Inn boundaries due to its forest-like and disturbed conditions.

### *2.1.3. Conclusion*

Little to no suitable habitat exists on-site or in the vicinity for the eastern hognose snake. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential, significant adverse impacts to the snake as a result of the Project.

## **2.2 Worm Snake (*Carphophis amoenus*)**

### *2.2.1. Habitat and Needs*

The worm snake is listed by New York State as a species of special concern. NYSDEC defines special concern as "any native species for which a welfare concern or risk of endangerment has been documented in New York State." The worm snake is characterized as an unpatterned brown snake with a pink belly, pointed head and small eyes. Its range is southern New England to central Georgia, west to southeast Nebraska, eastern Kansas, eastern Oklahoma and extreme northeast Texas. The worm snake breeds from April to May and September to October. During cold periods, it retreats deep into soil. The snakes dwell in damp locations such as under rocks, decaying logs or stumps in loose soils. Typical habitat for the species includes damp hilly woodlands, partially wooded or grassy hillsides above streams and farmland bordering woodlands. The worm snake predominantly feeds on earthworms.

### *2.2.2. Existing Conditions On-site*

The Residence Inn site does not provide adequate or suitable habitat for the worm snake. The preferred habitat for the snake is a sandy soil area within or bordering damp woodlands or streams. The site does not provide the habitats typical of the worm snake. The Soil Survey of Albany County shows the northern portion of the site as well drained Colonie soils. It further depicts the southern portion of the site as consisting of somewhat poorly drained, sandy Stafford soils. However, the site's vegetation is dominated by upland species, indicating that the Stafford soils are on the drier end of their drainage class (i.e., tending to moderately well drained). On-site soil samples also confirmed the absence of Stafford soils, with a well drained soil actually being present. No wetlands, streams, ponds or waters occur on or near the site. The closest "waters" are eastward, 600 plus feet across Washington Avenue Extension and are in the form of a storm basin associated with a shopping center. No surface waters occur to the west for at least 6,000 feet. Given the presence of Washington Avenue Extension, a heavily traveled major highway that acts as a barrier, to the east and the excessive distance to the west to surface

waters, any such migration is virtually impossible. Worm snakes are intolerant of dry conditions and often disappear from areas that have been cleared of vegetation, such as the majority of the project site. The north, west and southwest half of the site are forested and the northeast, east and underlain by well drained to excessively well drained soils. The southeast half of the site is open and covered with gravel. The entire site is, therefore, disturbed and/or contains excessively to moderately well drained soils. Finally, migration of the species to the site is unlikely and limited by the man-made berm on its southern boundary and a major highway on the north.

### *2.2.3. Conclusion*

Little to no suitable habitat exists on-site or in the vicinity for the worm snake. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the snake as a result of the Project.

## **2.3 Spotted Turtle (*Clemmys guttata*)**

### *2.3.1. Habitat and Needs*

The spotted turtle is listed by New York State as a species of special concern. NYSDEC defines special concern as “any native species for which a welfare concern or risk of endangerment has been documented in New York State.” The semi-aquatic turtle is identified by yellow spots on its black carapace and yellow and orange spots on the head, neck and limbs. The distribution of the spotted turtle is largely confined to two main areas, the Eastern Seaboard and the Great Lakes region. The Eastern Seaboard range is continuous from southern Maine to northern Florida. The Great Lakes range extends from western New York and western Pennsylvania west through northern Ohio and Indiana, and southern Ontario through to northeastern Illinois and western Michigan. There are also several isolated populations in central Indiana, South Carolina and North Carolina, southeastern Quebec and southern Ontario. The spotted turtle mates between March and May. Females lay eggs in June and hatchlings emerge in late August and September. Few eggs will over winter in nest and hatch the following spring. Spotted turtles winter underwater in soft mud, muskrat burrows or accumulated debris. The turtles prefer cooler spring months and is often found in areas where painted, wood and bog turtles reside. Typical habitat for spotted turtles includes marshy meadows, wet woodlands, boggy areas, beaver ponds and shallow, muddy-bottomed streams.

### *2.3.2. Existing Conditions On-site*

The Residence Inn site does not provide adequate or suitable habitat for the spotted turtle. The preferred habitat for the turtle is wetlands or wet areas. The site does not provide these habitats. The Soil Survey of Albany County shows the northern portion of the site as well drained Colonie soils. It further depicts the southern portion of the site as consisting of somewhat poorly drained, sandy Stafford soils. However, on-site soil samples confirmed the absence of Stafford soils, with a well drained soil actually being

present. No wetlands, streams, ponds or water, occur on or near the site. The closest "waters" are eastward, 600 plus feet across Washington Avenue Extension and are in the form of a storm basin associated with a shopping center. No surface waters occur to the west for at least 6,000. Given the presence of Washington Avenue Extension, a heavily traveled major highway that acts as a barrier, to the east and the excessive distance to the west to surface waters, any such migration is virtually impossible. Spotted turtles are a semi-aquatic species and are intolerant of dry conditions. The north, west and southwest half of the site are forested and the northeast, east and underlain by well drained to excessively well drained soils. The southeast half of the site is open and covered with gravel. The entire site is, therefore, disturbed and/or contains excessively to moderately well drained soils.

### *2.3.3. Conclusion*

Little to no suitable habitat exists on-site or in the vicinity for the spotted turtle. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the turtle as a result of the Project.

**3.0 ENDANGERED, THREATENED AND SPECIAL CONCERN  
ZOOLOGICAL SPECIES OF NEW YORK STATE:  
AMPHIBIANS**

**3.1 Eastern Spadefoot Toad (*Scaphiopus holbrooki*)**

*3.1.1. Habitat and Needs*

The eastern spadefoot toad is listed by New York State as a species of special concern. NYSDEC defines special concern as “any native species for which a welfare concern or risk of endangerment has been documented in New York State.” The spadefoot is described as a stout toad with very elliptical pupils and a sickle-shaped spade on each hind foot. The eastern spadefoot occurs in much of the eastern United States, from Alabama eastward and north to Massachusetts. Breeding occurs from March to September during extremely heavy rains. Egg deposition occurs in temporary pools or ponds of rain. Toads will travel great distances to reach these breeding areas. The toad is nocturnal and lives in shallow holes protecting itself from inclement weather above. The eastern spadefoot is typically found in areas of moist meadows, prairie woodlands and pine scrub. It inhabits areas with sandy or friable soils. This species feeds on other frogs and toads and any prey they can catch.

*3.1.2. Existing Conditions On-site*

The Residence Inn site does not provide adequate or suitable habitat for the eastern spadefoot toad. The preferred habitat for the toad is moist meadows, prairie woodlands and pine scrub with sandy soils. The Soil Survey of Albany County does depict the site as consisting of sandy soils; however, the majority of the site is currently disturbed. The north, west and southwest half of the site are forested and underlain by well-drained to excessively well drained soils. The northeast, east and southeast half of the site is open and covered with gravel. This portion of the site apparently has been previously used as a parking area. No moist habitats occur on-site. No wetlands, streams, ponds or waters occur on or near the site. The forest portion of the site does include white pine and pitch pine; but is a very limited forested area, scattered with red maple, black oak, gray birch, black cherry, cottonwood and trembling aspen. The NYSDEC has indicated its preference that white pines be selectively removed. Further, the eastern spadefoot feeds on other toads and frogs. The most abundant occurrence of their prey would be in proximity to wetlands. In the absence of wetlands on or near the site, the existing site does not provide any breeding habitat or suitable habitat for those prey species and, thus, there is likely to be very limited prey/food for the toad on or in the vicinity of the site. Finally, migration of the species to the site is unlikely and limited by the man-made berm on its southern boundary and major highway bordering the north.

### 3.1.3. Conclusion

Little to no suitable habitat exists on-site or in the vicinity for the eastern spadefoot toad. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the toad as a result of the Project.

## 3.2 Jefferson Salamander (*Ambystoma jeffersonianum*)

### 3.2.1. Habitat and Needs

The Jefferson salamander is listed by New York State as a species of special concern. NYSDEC defines special concern as “any native species for which a welfare concern or risk of endangerment has been documented in New York State.” The salamander is long and slender with a wide snout. They vary in color from dark brown, brownish-gray, or slate-gray, and tend to have bluish flecks along the sides of their body and tail, as well as on their legs. Jefferson salamanders are hard to distinguish from blue-spotted salamanders (*Ambystoma laterale*) because of their bluish spots. The Jefferson salamander occurs in west New England and south New York to Virginia and Indiana. Breeding occurs from March to April where the salamanders migrate to ponds and lays up to 300 eggs. Larvae hatch in 30 to 45 days and 2 - 4 months to metamorphose into land living adults. The salamander is nocturnal and lives in deciduous forests under debris near swamps and ponds. They are burrowers, spending most of their lives underground. Because of living underground, it is uncommon to see the Jefferson's except in the early spring when it migrates to ponds during the breeding season. Salamanders are carnivorous and eat a variety of small invertebrates.

### 3.2.2. Existing Conditions On-site

The Residence Inn site does not provide adequate or suitable habitat for the Jefferson salamander. The preferred habitat for this species is forests near swamps and ponds. The site does not contain any wet areas or ponds. The Soil Survey of Albany County shows the northern portion of the site as well drained Colonie soils. It further depicts the southern portion of the site as consisting of somewhat poorly drained, sandy Stafford soils. However, on-site soil samples confirmed the absence of Stafford soils, with a well drained soil actually being present. No wetlands, streams, ponds or waters occur on or near the site. The closest “waters” are eastward, 600 plus feet across Washington Avenue Extension and are in the form a storm basin associated with a shopping center. No surface waters occur to the west for at least 6,000. Given the presence of Washington Avenue Extension, a heavily traveled major highway that acts as a barrier, to the east and the excessive distance to the west to surface waters, any such migration is virtually impossible. Jefferson salamanders will migrate to ponds during breeding season. Given the presence of Washington Avenue Extension, a heavily traveled major highway that acts as a barrier to the east and the excessive distance to the west to surface waters, any

such migration is virtually impossible. The north, west and southwest half of the site are forested and the northeast, east and underlain by well drained to excessively well drained soils. The southeast half of the site is open and covered with gravel. The entire site is, therefore, disturbed and/or contains excessively to moderately well drained soils.

### *3.2.3. Conclusion*

Little to no suitable habitat exists on-site or in any reasonable vicinity for the Jefferson salamander. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the salamander as a result of the Project.

## 4.0 ENDANGERED, THREATENED AND SPECIAL CONCERN ZOOLOGICAL SPECIES OF NEW YORK STATE: INSECTS

### 4.1 Frosted Elfin (*Incisalia irus*)

#### 4.1.1. Habitat and Needs

The frosted elfin is listed by New York State as threatened. The NYSDEC defines threatened as “any native species likely to become an endangered species within the foreseeable future in New York State.” The elfin is listed at state-wide levels (species of concern, threatened and endangered) across the United States. The males are gray-brown above and females are reddish overall or in patches. The frosted elfin occurs from Florida north to New England, and west to Alabama and Wisconsin. In the eastern parts of its range, it occurs in mostly small patches of habitat, but larger populations are found further west, where the habitat is more contiguous. The life cycle of the frosted elfin begins with a yellowish-green caterpillar that feeds on the flowers and fruits of lupines (*Luinus sp.*) and false indigo (*Baptisis tinctoria*). Examples of host plants include lupines, false indigo and rattlebox (*Crotalaria sagittalis*). The chrysalis or pupa weaves a loose threaded cocoon in organic material and leaf litter and over winters. The elfin takes flight between late April and May and has one brood. They are weak fliers but are efficient colonizers that establish small, scattered populations. These insects inhabit open, second growth woods, roadside areas near host plants, Pine Barrens and open brushy fields.

#### 4.1.2. Existing Conditions On-site

The Residence Inn site does not provide adequate or suitable habitat for the frosted elfin. The elfin relies on specific host plants which the caterpillar feeds on. These plants include lupines, false indigo and rattlebox. None of these plants have been identified on-site. Vegetation on-site was observed and recorded by Richard Futyma, PhD, vegetation ecologist for the LA group, P.C. This data can be found in his correspondence dated July 8, 2005 and July 23, 2007 addressed to Mr. Daniel Hershberg of Hershberg & Hershberg Consulting Engineers. The blue lupine plant has been identified in the Albany Pine Bush. Pine Bush area property, occurring south and especially 0.9 miles to the west of the site, would be more suitable for the frosted elfin. Although the site does not contain adequate or suitable habitat for such species, the natural forested area separating the site from the area south of the site also acts as a deterrent to the site for these weak fliers.

#### 4.1.3. Conclusion

No suitable habitat exists on-site for the frosted elfin. Further, this species was not observed on-site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the frosted elfin as a result of the Project.



## 4.2 Mottled Duskywing (*Erynnis martialis*)

### 4.2.1. Habitat and Needs

The mottled duskywing is listed by New York State as a species of special concern. The NYSDEC defines special concern as “any native species for which a welfare concern or risk of endangerment has been documented in New York State.” The moths are identified by the appearance of upper side bands that contribute to the mottled exterior of both wings. Freshly-emerged butterflies have a purplish iridescence. Male has a costal fold containing yellow scent scales; female has a patch of scent scales on the 7th abdominal segment. The mottled duskywing occurs from Massachusetts and southern Ontario west across the Great Lake states to Minnesota; south to South Carolina, the Gulf Coast, and central Texas. Isolated populations of the moths occur in eastern Wyoming, eastern Colorado, and western South Dakota. The life cycle of the mottled duskywing begins with a light green, white speckled, red, yellow or orange head caterpillar that feeds on wild lilacs including New Jersey tea (*Ceanothus americanus*) and prairie redroot (*Ceanothus herbaceus* var. *pubescens*). The chrysalis is dark green or brown. The duskywing takes flight between May and July and has two broods in most of its range. These invertebrates inhabit wooded uplands often on acid soils. They are also found in open woods and thickets, clusters of vegetation on plains, barrens, prairie hills, open brushy fields and chaparral.

### 4.2.2. Existing Conditions On-site

A very limited patch of one of the food sources for this species is located on the northern part of the site. During Dr. Futyma’s visits in June and July of 2004 and July 12, 2007, he observed New Jersey tea (usually found in dry open woods) in bloom on-site. This plant species, among few others, is necessary to the caterpillars’ existence. Further, the project site consists of wooded uplands which are one ecological community the duskywing inhabits. However, the wooded portion of the site also contains numerous shrub and herbaceous species which do not constitute appropriate habitat. The presence of the well developed understory significantly inhibits the presence of the duskywing even if it were located in the vicinity of the site. New Jersey tea is a common plant in eastern North America. This species has been identified in the Albany Pine Bush Preserve. The Pine Bush area property, occurring south and especially 0.9 miles to the west of the site, would be more suitable for the elfin. Several species of butterflies and moths were observed by Dr. Futyma during his site visits in June and July of 2004 and July of 2007 and the duskywing was not identified. B. Laing Associates also did not locate the species on or in the vicinity of the site during its site visits. The species identified by B. Laing are found on Table 1 and they did not include the mottled duskywing. Finally, the Natural Heritage Program report did not list this species as being possibly located on or in the vicinity of the site.

#### 4.2.3. Conclusion

A very limited patch of one of the food sources for this species was located on the northern part of the site. However, this species was not observed on-site or in the vicinity of the site during sampling events conducted between May and July of 2007 by B. Laing or Dr. Futyma during prior visits. There are no potential adverse impacts to the duskywing as a result of the project.

### 4.3 Henry's Elfin (*Incisalia henrici*)

#### 4.3.1. Habitat and Needs

Henry's elfin is listed by New York State as a species of special concern. The NYSDEC defines special concern as "any native species for which a welfare concern or risk of endangerment has been documented in New York State." This species is also listed as special concern in additional states such as Rhode Island and Wisconsin. Henry's elfin is a tailed species with its upper side dark brown with reddish scaling (especially on the female). Henry's elfin occurs in Wisconsin, Michigan, Quebec and Nova Scotia south to Nebraska, Illinois, Texas and Florida. The life cycle of Henry's elfin begins with a red to brownish-green caterpillar that feeds on blueberries (*Vaccinium*), redbud (*Cercis canadensis*), huckleberry (*Gaylussacia sp.*), wild plum (*Prunus*), and Texas persimmon (*Diospyros texana*). Henry's elfin takes flight between April and May and has one brood. This butterfly inhabits a variety of habitats including coastal plains, brushy areas, acid scrub, open forests, piedmont mountains, pine barrens, barrier islands and damp powerline right-of-ways and other woodland openings.

#### 4.3.2. Existing Conditions On-site

The Residence Inn site does not provide adequate or suitable habitat for Henry's elfin. The elfin relies on specific host plants which the caterpillar feeds on. These plants include high bush blueberry (*Vaccinium corymbosum*), redbud (*Cercis canadensis*), huckleberry (*Gaylussacia sp.*), wild plum (*Prunus sp.*) and Texas persimmon (*Diospyros virginiana*). Only low-bush blueberry has been identified on-site. Vegetation on-site was observed and recorded by Richard Futyma, PhD, vegetation ecologist for the LA group, P.C. This data can be found in his correspondence dated July 8, 2005 and July 23, 2007 addressed to Mr. Daniel Hershberg of Hershberg & Hershberg Consulting Engineers. Henry's elfin has been identified in the Albany Pine Bush. Pine Bush area property, occurring south and especially 0.9 miles to the west of the site, would be more suitable for the elfin. The site is half forested and half gravel parking area. Finally, the Natural Heritage Program report did not list this species as being possibly located on or in the vicinity of the site.

#### 4.3.3. Conclusion

Little to no suitable habitat exists on-site or in the vicinity for Henry's elfin. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the butterfly as a result of the project.

#### 4.4 Edwards' Hairstreak (*Satyrium edwardsii*)

##### 4.4.1. Habitat and Needs

Edwards' hairstreak is not listed by New York State as endangered, threatened or of special concern. It is ranked, however, as vulnerable. This species is gray-brown above and below. The front wing and hind wing have bands which consist of rows of discontinuous small, dark brown oval spots. The Edwards' hairstreak occurs from Eastern United States from southern Canada and southern Maine south to northeast Texas, central Missouri, and northern Georgia. The life cycle of the species begins when eggs are laid in bark crevices of young hosts (usually scrub oak, *Quercus ilicifolia*, pitch pine (*Pinus rigida*)). Young caterpillars eat buds of the host plants during the day. Older caterpillars eat leaves at night and hide during the day in ant nests at the base of the host tree. In return for protection, the ants feed on honeydew produced by the caterpillars. The chrysalis intertwines a loose threaded cocoon in organic material and leaf litter and over winters. The butterfly takes flight between late June and July and has one brood. These insects inhabit dense scrub oak thickets among open woods and sandy barrens.

##### 4.4.2. Existing Conditions On-site

The Residence Inn site does not provide adequate or suitable habitat for the Edwards' hairstreak. The preferred habitat for the butterfly is dense scrub oak/pitch pine thickets. This habitat does not occur on-site. The site is composed of both forest and gravel areas. Scrub oak and pitch pine were observed on-site by Richard Futyma, PhD, vegetation ecologist for the LA group, P.C. However, they are one of many species in the forested portion of the site. The vegetative data can be found in his correspondence dated July 23, 2007 addressed to Mr. Daniel Hershberg of Hershberg & Hershberg Consulting Engineers. The Albany Pine Bush area property, occurring south and especially 0.9 miles to the west of the site would be more suitable for the hairstreaks. The Natural Heritage Program correspondence of July 12, 2007 state that these species have been observed in the Albany Pine Bush.

##### 4.4.3. Conclusion

No suitable habitat exists on-site for the Edwards' hairstreak. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in June and July of 2007. Thus, there are no potential adverse impacts to the butterfly as a result of the Project.

#### 4.5 Bird Dropping Moth (*Cerma cora*)

The bird dropping moth is not listed by New York State as endangered, threatened or of special concern. It is ranked, however, as critically imperiled. Critically imperiled species are those that have 5 known or fewer locations in the state. Little information is available for this species and, so, habitat and needs is not described herein. Most larvae feed on plant foliage, dead leaves, lichens, and fungi. It should be noted that this species was not observed on-site or in the vicinity of the site during sampling events conducted by B. Laing Associates, Inc. in May, June and July of 2007. Thus, there are no potential adverse impacts to the butterfly as a result of the Project.

#### 4.6 Noctuid Moths (*Chytonix sensilis*, *Macrochilo bivittata*, *Zanclognatha martha*)

##### 4.6.1. Habitat and Needs

Noctuid moths are usually dull-colored medium-sized nocturnal moths. There are several species of noctuid moths. None, specific to this site, are listed by New York State as endangered, threatened or of special concern. *Chytonix sensilis* and *Zanclognatha martha* are ranked as critically imperiled. *Macrochilo bivittata* is ranked by NYS as unrankable. Very little information is available on certain noctuid moth species. The noctuid moth (*Macrochilo bivittata*) is tan to very light brown. The forewing above is marked with two longitudinal dark chocolate brown dashes, one along the full length of the inner margin and the other in the apical area from the midpoint toward the outer margin. The noctuid moth occurs from the Atlantic coast west across the parklands and southern boreal forest to central Alberta; south to Massachusetts and Ohio. The larva feeds on sedge species (*Carex sp.*), hibernates partly grown, finishes feeding and pupates in a fragile cocoon in May and flies as an adult from June to early August. The noctuid moths' inhabit wetlands, especially calcareous areas of sedge meadows, fens, wet prairie.

##### 4.6.2. Existing Conditions On-site

The Residence Inn site does not provide adequate or suitable habitat for the noctuid moth. The preferred habitat for the moth is wetlands, wet meadows and boggy areas. The site and its surroundings do not contain wetlands. The site is composed of both forest and gravel areas. The Albany Pine Bush area property, occurring south and especially 0.9 miles to the west of the site would be more suitable for the noctuids moth. The Natural Heritage Program correspondence of July 12, 2007 state that these species have been observed and collected in the Albany Pine Bush.

##### 4.6.3. Conclusion

No suitable habitat exists on-site for the noctuid moth. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted between May and July of 2007. Thus, there are no potential adverse impacts to the butterfly as a result of the Project.

## 4.7 Inland Barrens Buckmoth (*Hemileuca maia maia*)

### 4.7.1. *Habitat and Needs*

The inland barrens buckmoth is listed by New York State as a species of special concern. NYSDEC defines special concern as “any native species for which a welfare concern or risk of endangerment has been documented in New York State.” Females are larger than the males. The male abdomen is black with a red tip, whereas, the female abdomen is black. The upperside of the moths is black with an off-white median band and a small eyespot on each wing. The inland barrens buckmoth occurs from Maine west to eastern Kansas; south to northern Florida, the Gulf states, and eastern Texas. Female moths lay groups of eggs in rings around twigs of the host. Host plants include various oak trees (*Quercus sp.*). The eggs over winter, and when they hatch the next spring the young caterpillars feed in groups. The moths have one brood from September to December. The insects inhabit scrub oak-pine sand barrens, oak woods, and oak trees in cities.

### 4.7.2. *Existing Conditions On-site*

The Residence Inn site does not provide adequate or suitable habitat for the inland barrens buckmoth. The preferred habitat for the moth is scrub oak and Pine Barrens. The subject site is composed of both forest and gravel areas. Scrub oak and pitch pine were observed on-site by Richard Futyma, PhD, vegetation ecologist for the LA group, P.C. However, they are one of many species in the forested portion of the site. The vegetative data can be found in his correspondence dated July 23, 2007 addressed to Mr. Daniel Hershberg of Hershberg & Hershberg Consulting Engineers. The Albany Pine Bush area property, occurring south and especially 0.9 miles to the west of the site would be more suitable for the buckmoth. The Natural Heritage Program correspondence of July 12, 2007 state that these species have been observed in the Albany Pine Bush.

### 4.7.3. *Conclusion*

No suitable habitat exists on-site for the inland barrens buckmoth. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. Thus, there are no potential adverse impacts to the buckmoth as a result of the Project.

**5.0 ENDANGERED, THREATENED AND SPECIAL CONCERN  
ZOOLOGICAL SPECIES OF NEW YORK STATE:  
BIRDS**

**5.1 Sharp-Shinned Hawk (*Accipiter striatus*)**

*5.1.1. Habitat and Needs*

The sharp-shinned hawk is listed by New York State as a species of special concern. NYSDEC defines special concern as “any native species for which a welfare concern or risk of endangerment has been documented in New York State.” This species is listed as a species of concern in several states such as Massachusetts. The sharp-shinned hawk, known as sharpie, is a small species with a long, barred tail that ends with a square tip. Its wings are short and rounded and adults can be identified with blue-gray back and wings and reddish barring on the under side. The hawks breed from central Alaska, throughout most of Canada, south to the northern states and through the Appalachian Mountain areas to northern Alabama. In the western United States, the sharp-shinned hawks breed locally, south through central Mexico and Central America. Species are, for the most part, absent throughout the Midwest and the Great Plains. In the winters, the hawk can be found along the coastline from southern Alaska south and from southern Canada through most of the United States. Like most accipiters, it migrates during daylight hours. It flies just above treetops in the early morning and often soars high at midday. Sharp-shinned hawks prefer open, conifer woodlands and wood margins to inhabit. They are generally not present in small woodlots. In winter time, hawks can be found in a larger variety of habitats including urban and suburban settings. These small accipiters have been identified by the authors at malls during winter migration months feeding on pigeons. Sharp-shinned hawks prey on small birds up to the size of pigeons.

*5.1.2. Existing Conditions On-site*

The Residence Inn site does not provide adequate or suitable habitat for the sharp-shinned hawk. The preferred habitat for the hawk is open woodlands and wood margins. They generally do not occur in small woodlots like the subject property. The north, west and southwest half of the 3.6-acre site is forested (approximately 1.8 acres) and the northeast, east and southeast half of the site is open and covered with gravel. The sharp-shinned hawk would be more likely to inhabit the Albany Pine Bush area. The conifer woodlands located 0.9 miles to the west would be better suited to this accipiter. Further, it is possible that the hawk would utilize the National Grid transmission ROW (west and south of the project site) for hunting.

### 5.1.3. Conclusion

Little to no suitable habitat exists on-site or in the vicinity for sharp-shinned hawk. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. None were observed or heard to occur. Thus, there are no potential adverse impacts to the hawk as a result of the Project. However, the species is not entirely adverse to development. In fact, as previously mentioned, sharp-shinned hawks have been observed by the author at mall locations feeding on pigeons.

## 5.2 Cooper's Hawk (*Accipiter cooperii*)

### 5.2.1. Habitat and Needs

The Cooper's hawk is listed by New York State as a species of special concern. NYSDEC defines special concern as "any native species for which a welfare concern or risk of endangerment has been documented in New York State." The hawk declined greatly in the 1940's and 1950's due to the use of the pesticide DDT and, thus, is listed in several states as threatened or species of special concern. Cooper's hawk is very similar in plumage as the sharp-shinned hawk. Cooper's hawk is a medium sized bird with a long, barred tail that ends with a round tip (unlike the sharp-shinned which is square). Its wings are short and rounded with a back that is dark gray or gray-brown back and barred reddish and white under side. During the summer time, the Cooper's hawk breeds across southern Canada southward to the United States and into central Mexico. In the winter time, the hawk breeds throughout the United States and Canada. Migration for the hawks begins in late August and continues into early November. Cooper's hawk prefers open woodlands and wood margins for habitat. They breed in deciduous, mixed and coniferous forests. They have recently become more common in urban and suburban settings. These accipiters feed on medium-sized birds and mammals.

### 5.2.2. Existing Conditions On-site

The Residence Inn site does not provide adequate or suitable feeding or breeding habitat for the Cooper's hawk. The preferred habitat for the hawk is open woodlands and wood margins. They generally do not occur in small woodlots like the subject property. Breeding habitat usually requires extensive woodlands. The north, west and southwest half of the 3.6-acre site is forested (approximately 1.8 acres) and the northeast, east and southeast half of the site is open and covered with gravel. The Cooper's hawk would be more likely to inhabit the Albany Pine Bush area. The conifer woodlands located 0.9 miles to the west would be better suited to this accipiter. Further, it is possible that the hawk would utilize the National Grid transmission ROW (west and south of the project site) for hunting.

### 5.2.3. Conclusion

Little to no suitable habitat exists on-site or in the vicinity for Cooper's hawk. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. None were observed or heard to occur. Thus, there are no potential adverse impacts to the hawk as a result of the Project.

## 5.3 Golden-Winged Warbler (*Vermivora chrysoptera*)

### 5.3.1. Habitat and Needs

The golden-winged warbler is listed by New York State as a species of special concern. NYSDEC defines special concern as "any native species for which a welfare concern or risk of endangerment has been documented in New York State." The warbler is a small songbird with bright patches of yellow on the crown and wings, gray colored plumage, and chickadee-like patches of black on the throat and face. During the summertime, the golden-winged warbler breeds from southeastern Manitoba and northern Minnesota eastward to southern New Hampshire, and southward to southern Illinois and northern Georgia. In the winter time, the warbler occurs in Central America and northern South America from Guatemala southward to Columbia and western Venezuela. The golden-winged warbler inhabits patchy shrub land and forest edge, such as shrubby fields, marshes, and bogs. Winter habitat includes the canopies of tropical forests. Specifically in New York, the majority of territories are in shrubby fields produced by secondary succession following farmland abandonment. Although populations are declining in many areas, it is spreading its range to the northwest where farmland desertion and clear cutting are widespread. The golden-winged warblers feed on insects and spiders.

### 5.3.2. Existing Conditions On-site

The Residence Inn site does not provide adequate or suitable habitat for the golden-winged warbler. The preferred habitats for the warbler are shrubby areas produced by secondary succession and forest edges. The north, west and southwest half of the 3.6-acre site is forested (approximately 1.8 acres) and the northeast, east and southeast half of the site is open and covered with gravel. Neither is a shrubby habitat. The warbler also inhabits areas of marshes and bogs. The site does not have any wet areas. The closest "waters" are eastward, 600 plus feet across Washington Avenue Extension and are in the form of a storm basin associated with a shopping center. No surface water occurs to the west for at least 6,000 feet. It is possible that the warbler would utilize the National Grid transmission ROW (west and south of the project site) as a food source.

### 5.3.3. Conclusion

Little to no suitable habitat exists on-site or in the vicinity for golden-winged warbler. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. None were observed or heard



to occur. Thus, there are no potential adverse impacts to the warbler as a result of the project.

#### **5.4 Yellow-Breasted Chat (*Icteria virens*)**

##### *5.4.1. Habitat and Needs*

The yellow-breasted chat is listed by New York State as a species of special concern. NYSDEC defines special concern as “any native species for which a welfare concern or risk of endangerment has been documented in New York State.” The chat is the largest wood warbler and is identified by its bright yellow chest and throat, olive-green back and white belly and under tail. It is also known for its loud song and conspicuous display flights. In the summer time, the yellow-breasted chat breeds across the eastern United States and southern Canada from Iowa to New York, southward to Texas and northern Florida. It is also found in scattered regions across the west from southern Canada to very northern Mexico. In the winter time, the warbler occurs in Mexico and Central America. The yellow-breasted chat occupies low, dense deciduous and coniferous vegetation and dense second-growth, riparian thickets, and brush. It also inhabits abandoned agricultural fields, clear-cuts, power-line corridors, fencerows, forest edges and openings, and near streams, pond edges, and swamps. The yellow-breasted chat feeds on small invertebrates and fruits.

##### *5.4.2. Existing Conditions On-site*

The Residence Inn site does not provide adequate or suitable habitat for the yellow-breasted chat. The preferred habitats for the chat are low, dense deciduous and coniferous vegetation and dense second-growth, riparian thickets, and brush. The north, west and southwest half of the 3.6-acre site is forested (approximately 1.8 acres) and the northeast, east and southeast half of the site is open and covered with gravel. The chat also inhabits areas of overgrown clear-cuts and wet areas. No wetlands, streams, ponds or waters occur on or near the site. The closest “waters” are eastward, 600 plus feet across Washington Avenue Extension and are in the form a storm basin associated with a shopping center. No surface waters occur to the west for at least 6,000 feet. It is possible that the chat would utilize the National Grid transmission ROW (west and south of the project site) as a food source. It is also possible that the chat could find suitable habitat in the Albany Pine Bush preservation. Pine Bush area property, occurring south and especially 0.9 miles to the west of the site, would be more suitable for this species.

##### *5.4.3. Conclusion*

Little to no suitable habitat exists on-site or in the vicinity for yellow-breasted chat. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. None were observed or heard to occur. Thus, there are no potential adverse impacts to the warbler as a result of the Project.

## 5.5 Whip-Poor-Will (*Caprimulgus vociferus*)

### 5.5.1. Habitat and Needs

The whip-poor-will is listed by New York State as a species of special concern. NYSDEC defines special concern as “any native species for which a welfare concern or risk of endangerment has been documented in New York State.” The whip-poor-will has a large head and flattened, large eyes with eyelashes on lids. It has a small bill and its tail and wings are rounded. The plumage is grayish brown streaked with blackish brown and broad blackish stripes on the crown. They have a band of white on the lower throat emphasized by a blackish throat above and blackish breast below. In the summertime, the whip-poor-will breeds locally from central Canada eastward to Atlantic coast and southward to Oklahoma and Georgia. They can also be observed in scattered regions in the southwest and southward into Central America. The whip-poor-will winters from southeastern United States to Central American. This avian species breeds in deciduous or mixed forests with little to no underbrush. In the winter, it occupies wooded areas near fields. In New York State, the whip-poor-will is prevalent in northern hardwood forests of Hudson Valley and low-elevation forests surrounding the Adirondacks with species that include mainly white pine (*Pinus strobus*) and oak (*Quercus sp.*) or aspen (*Populus spp.*), gray birch (*Betula populifolia*) paper birch (*Betula papyrifera*) forests. It prefers wooded areas with little to no undergrowth. The whip-poor-will feeds on insects especially moths and beetles.

### 5.5.2. Existing Conditions On-site

The Residence Inn site does not provide possible suitable habitat for the whip-poor-will. The bird inhabits forests with certain specific tree species which have been identified on-site. During Dr. Futyma’s visits in June and July of 2004 and July of 2007, he observed oak trees, gray birch, white pine and pitch pine on-site. These tree species are representative of the mixed forests that whip-poor-wills inhabit. However, the wooded portion of the site also contains numerous shrub and herbaceous species. The presence of the well developed understory precludes the presence of the whip-poor-will. This avian species also inhabits wooded areas near fields. It is possible that the whip-poor-will would utilize the National Grid transmission ROW (west and south of the project site) as suitable habitat.

### 5.5.3. Conclusion

No suitable habitat exists on-site for the whip-poor-will. Further, this species was not observed on-site or in the vicinity of the site during sampling events conducted in May, June and July of 2007. None were observed or heard to occur. Thus, there are no potential adverse impacts to the whip-poor-will as a result of the Project.

TABLE 1

Species Occurance  
 Residence Inn Site, Albany, New York  
 WOHINN01  
 Species

	03/07/07	03/13/07	05/07/07	06/05/07	06/18/07	06/20/07	06/21/07	07/10/07 *	07/11/07	07/13/07	07/31/07
<b>Birds</b>											
American Robin ( <i>Turdus migratorius</i> )			x								
American Crow ( <i>Corvus brachyrynchos</i> )	x	x	x	x	x		x		x		
Blue Jay ( <i>Cyanocitta cristata</i> )						x	x		x	x	
Cat bird ( <i>Dumetella carolinensis</i> )					x		x		x		
Cardinal ( <i>Cardinalis cardinalis</i> )				x		x	x				
Eastern King Bird ( <i>Tyrannus tyrannus</i> )		x			x				x		
European Starling ( <i>Sturnus vulgaris</i> )					x						
Field Sparrow ( <i>Spizella pusilla</i> )				x			x				
herring gull ( <i>Larus argentatus</i> )				x					x		
Kill deer ( <i>Charadrius vociferus</i> )			x	x	x	x	x				
Northern Flicker ( <i>Colaptes auratus</i> )									x		
Red-tailed hawk ( <i>Buteo jamaicensis</i> )									x		
Rufus sided towhee ( <i>Pipilo erythrophthalmus</i> )					x						
song sparrow ( <i>Melospiza melodia</i> )									x		
tufted titmouse ( <i>Baeolophus bicolor</i> )									x		
Whip-poor-will ( <i>Caprimulgus vociferus</i> )					None were found						
<b>Butterflies</b>											
Cabbage Butterflies ( <i>Pieris rapae</i> )										x	x
<b>Mammals</b>											
Cottontail rabbit ( <i>Sylvilagus Spp.</i> )								x			
Skunk ( <i>Mephitis Spp.</i> )								x			
<b>Amphibians</b>											
Fowlers Toad ( <i>Bufo fowleri</i> )				x							

**Key**

\* - Evening Survey

**Notes**

No butterflies/wildlife of concern have been found on site as of 7/31/07.

**RESIDENCE INN                      THARALDSON DEVELOPMENT COMPANY**  
**124-128R WASHINGTON AVENUE EXTENSION    ALBANY, NEW YORK**

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**APPENDIX SDV**

LETTER FROM UNITED STATES FISH & WILDLIFE SERVICE & NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION DATED OCTOBER 20, 2006



## United States Department of the Interior

### FISH AND WILDLIFE SERVICE

3817 Luker Road  
Cortland, NY 13045



October 20, 2006

Mr. Daniel R. Hershberg, P.E./L.S.  
Hershberg and Hershberg  
18 Locust Street  
Albany, NY 12203

Dear Mr. Hershberg:

This letter is in regards to the Tharaldson Development Company's proposed Residence Inn Hotel at 124-128R Washington Avenue Extension in the City of Albany, Albany County, New York. The following comments are provided as technical assistance pursuant to the Endangered Species Act of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*) and serve to update the project status for the record.

As you are aware, on August 31, 2006, Ms. Robyn Niver, of this office; met with you, Ms. Kathleen O'Brien, and Mr. Karl Parker of the New York State Department of Environmental Conservation (NYSDEC), Mr. Terrance Gorman, representing the City of Albany (City), and Mr. Thomas Shepardson of Whiteman, Osterman & Hanna LLP. At that meeting, Ms. Niver and the NYSDEC concluded that portions of the proposed project area are used by Karner blue butterflies (*Lycaeides melissa samuelis*) as nectar habitat. While the site is not anticipated to be occupied on a daily basis by Karner blue butterflies (given the suitable breeding and nectar habitat located within the management area adjacent to the proposed project area), it is well within the distance Karner blue butterflies are known to fly and only separated from observed occupied habitat by a small strip of woods. They also presented you and Mr. Shepardson with two options to present to the project sponsor: design the proposed project to avoid any potential "take"<sup>1</sup> of Karner blue butterflies or apply for an incidental take permit from the U.S. Fish and Wildlife Service (Service) and NYSDEC.

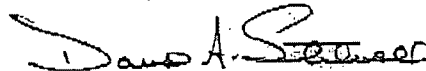
The Service summarized discussions from the site visit in our September 18, 2006, letter to Mr. Douglas Melnick of the City of Albany Department of Development and Planning. In that letter, we also requested the City withhold any final approvals for the proposed project until our concerns are resolved regarding the potential for adverse impacts to the Karner blue butterfly. Per electronic mail dated September 28, 2006, from Mr. Melnick, we understand the City did conditionally approve a site plan; however, we have not received written copies of the findings or Notice of Local Action from the City to date.

<sup>1</sup> Take is defined under the Section 3 of ESA, and includes in part, to "harass, harm, wound, or kill" a Federally-listed species. The definition of harm has been further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering.

Since writing our September 18, 2006, letter, there has been a great deal of coordination among you, Mr. Shepardson, the project sponsor, the Service, and NYSDEC regarding development of a project plan that will avoid the potential take of Karner blue butterflies. This plan involves two components: deterring Karner blue butterflies from flying into unsuitable habitat (where the proposed hotel and parking lot will occur) and restoration and management of habitat to maintain (at a minimum) or enhance (ideally) survival and reproductive success of the Pine Bush Southeast population of the Karner blue butterfly. To accomplish the first goal, the project sponsor has agreed to establish an 8-foot stockade fence along the southern and eastern perimeter of the property. To accomplish the second goal, the project sponsor has agreed to transfer 0.25 acre of the site to the NYSDEC or Albany Pine Bush Preserve Commission (APBPC) for Karner blue butterfly habitat management; selectively remove white pine trees along the border of the project area; and establish a fund to allow for restoration and management of habitat for Karner blue butterflies. We understand the project sponsor prefers that this fund would be held and managed by a third party. The initial fund amount has not been finalized but the Service and NYSDEC are interested in an amount that will allow for the annual restoration and management of approximately 1.7 acres of habitat in perpetuity. The area intended for restoration and management generally includes the powerline right-of-way along the border of the project area, westward to the Avila Property.

We look forward to finalizing the project sponsor's avoidance and conservation plan for the Karner blue butterfly. Thank you for your time. If you require additional information please contact Robyn Niver at (607) 753-9334.

Sincerely,



David A. Stilwell  
Field Supervisor

cc: S. Downs, Selkirk, NY  
Whiteman, Osterman & Hanna LLP, Albany, NY (Attn: T. Shepardson)  
APBPC, Albany, NY (Attn: N. Gifford)  
Department of Development and Planning, Albany, NY (Attn: D. Melnick)  
NYSDEC, Albany, NY (Endangered Species Unit; Attn: P. Nye/K. O'Brien)  
NYSDEC, Schenectady, NY (Attn: K. Parker)

RESIDENCE INN                      THARALDSON DEVELOPMENT COMPANY  
124-128R WASHINGTON AVENUE EXTENSION    ALBANY, NEW YORK

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APPENDIX SDVI

LETTER REPORT BY DR. RICHARD P. FUTYMA, PhD  
THE LA GROUP DATED JUNE 9, 2006



**the LA group**  
Landscape Architecture  
and Engineering, P.C.

40 Long Alley  
Saratoga Springs  
New York 12866  
518/587-8100  
Telefax 518/587-0180

June 9, 2006

Daniel R. Hershberg  
Hershberg & Hershberg Consulting Engineers  
and Land Surveyors  
18 Locust Street  
Albany, New York 12203-2908

*Re: Ecological Assessment Update, 124-128R Washington Avenue Extension, City of Albany, New York*

Dear Mr. Hershberg:

This report supplements my prior ecological reports dated December 8, 2004, and July 8, 2005, in connection with the Residence Inn Project located at 124-128R Washington Avenue, Albany, NY. (the "Site").

On June 1, 2006, I met you, together with Robyn Niver of the United States Fish and Wildlife, and Kathy O'Brien of the New York State Department of Environmental Conservation at the Site. Neil Gifford of the Albany Pine Bush Preserve, Michael Yevoli and Christian Leo from the City of Albany Planning Office Commission were also in attendance.

The Site visit began at 11:00 A.M. where all parties met at the Site and continued until 12:15 P.M. Weather conditions, being warm and relatively sunny, were suitable for potentially locating Karner Blue Butterflies in flight. We began the Site investigation in the center of the Site and worked our way to the south. The north and central part of the site is characterized by open gravel space that is intermixed with herb dominated vegetation. The vegetative characteristics are described in the discussion in my July 8, 2005 report. No habitat which supports breeding of Karner Blue Butterflies was located in this previously cleared area.

We investigated the wooded area which dominates the southern portion of the Site. This wooded area averages approximately 100 feet including the southerly area of the Site as well as areas beyond the Site limits which are not under the control of Tharaldson. As noted in my earlier report, this wooded area acts as buffer between the central portion of the Site and the Karner Blue Butterfly management area. Based on my observations, the wooded area constitutes unsuitable habitat that impedes the movement of the Karner Blue Butterflies with no viable connection to the Site.

Migratory patterns were discussed at length. The NIMO power line right-of-way located south of the Site was also investigated. It was apparent that blue lupine vegetation had been planted within the NIMO right-of-way located southwest of the Site to encourage westward migration. Mr. Gifford confirmed that the Pine Bush Commission had planted the vegetation in an effort to



Daniel R. Hershberg  
June 9, 2006  
Page 2 of 2

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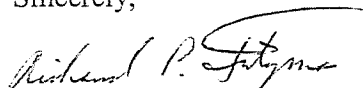
encourage the westerly migration of the butterflies, a goal of the 2002 Pine Bush Management Plan. It was the consensus of Ms. Niver and O'Brien that this objective should be encouraged. This opinion confirmed the conclusions in my prior reports.

During the Site investigation no Karner Blue Butterflies were observed on the Site, although at least one was seen in the NIMO right-of-way located south of the site. No other threatened or endangered species were observed on the Site. Therefore, in over six years that I have visited and reported concerning the conditions of the Site, no Karner Blue Butterflies have ever been observed. The absence of blue lupine on the Site, their necessary larval resource, is a clear indication that the Site does not possess the necessary characteristics or appropriate habitat for reproduction of the Karner Blue Butterfly. Moreover, consideration of introducing such habitat would be inconsistent with the management objective of westward migration. Migration in a northerly direction should not be encouraged given the geographic and natural limitations and proximity of the Washington Avenue Extension and existing commercial uses located to the north of the Site.

In sum, after examining the entire Site, no Karner Blue Butterflies or suitable habitat were observed on the Site. The lack of blue lupine vegetation together with the existing forested buffer, discourages northward migration toward the Site. Steps have been taken to facilitate the management objective of westward migration of the Karner Blue Butterflies. These efforts should be maintained and are consistent with the goals of the 2002 Pine Bush Management Plan and recovery of the species.

If you would like to discuss this matter further or have any questions concerning my conclusions, please do not hesitate to contact me.

Sincerely,



Richard P. Futyma, Ph.D.  
Vegetation Ecologist  
for  
the L.A. Group, P.C.